No. 11805

In the United States Circuit Court of Appeals for the Ninth Circuit

EUGENE C. WATSON, APPELLANT

v.

DEUTSCHE STEAMSHIP COMPANY, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

H. G. MORISON,
Assistant Attorney General.
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
Admiralty and Shipping Section,
Department of Justice.

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The United States files this brief *amicus curiae* because of the importance of the problem here presented for direct operation by the Government of its cargo vessels. The United States Maritime Commission has requested the Department of Justice to advise the Courts of the Government's interest in cases of this character and of its position respecting the issues involved.

QUESTION PRESENTED

Whether appellant Watson, a civil service seaman of the United States employed on a government-owned vessel operated by the War Shipping Administration, has a cause of action for damages under the Jones Act and for maintenance under the general maritime law against appellee Deconhil, which acted as agent

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of its disclosed principal, the United States, in managing the accounting and certain other shoreside business of a government vessel.

THE INTEREST OF THE UNITED STATES

It is of the greatest importance to the United States that the Government and not its agents be recognized as operating owner in possession and control of government vessels which are manned, operated and navigated by it through ship masters who are its direct agents and employees and which are victualled, supplied and maintained by it through shipping companies who are employed as ships' husbands and berth agents. If the masters and crews of such government vessels can be treated as the agents, servants and employees of such shipping companies rather than of the United States, then the shipping companies must be deemed owners *pro hac vice* or operators of the vessels and the Government a mere reversionary owner who has parted with possession and control of its vessels.

Such a conclusion, that the agents are operators, is, naturally, of little practical importance to appellee Deconhil or any other government agent, for if they reasonably defend themselves in litigation brought against them they are entitled to reimbursement and idemnity from the United States. But to the Government the results of the conclusion that the agents are operators in possession and control will be disastrous for direct government operation, both retrospectively during the war just ended and prospectively during any other period of emergency which may

again make direct government operation necessary. Such a conclusion will make it impossible for the Government to follow its present practice of engaging the existing shoreside organizations of shipping companies to attend to the shoreside operations of government vessels.[1] It will oblige the United States in time of emergency to create new shoreside organizations of its own, with consequent increased expense and delay in starting its direct operations.

If the master and crew of government vessels can be held to be the employees of the vessels' shoreside agents for the purpose of responsibility and control, these agents and not the United States must be treated as the operators or owners *pro hac vice* and the vessels, not being in the possession of public authority, will not again be entitled to governmental immunity in foreign ports. Cf. *Mexico* v. *Hoffman,* 324 U. S. 30, 37–38; *The Navemar,* 303 U. S. 68, 74. Such a conclusion defeats the intention of Congress. Congress has always taken care expressly to reserve the sovereign

[1] See H. Rep. No. 2572, 77th Cong., 2d sess., p. 8: "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedore, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort. This development confirms the wisdom of the congressional policy in the recent years of stimulating and assisting the development of such private merchant marine and insurance facilities at substantial Government cost. The policy has permitted a quick change-over from peacetime to wartime operations of the entire merchant marine without any substantial loss of efficiency or impairment of morale." (Cf. letter of the General Counsel, U. S. Maritime Commission, *infra*, Appendix, p. A–9.)

immunity of such vessels although it has accepted civil responsibility for their acts. See 46 U. S. Code 747. Certainly nothing in any act of Congress justifies holding that by employing private companies as general agents and berth agents to manage and conduct the accounting and certain other shoreside business of the vessels, the Government has transferred the operating ownership of the vessels themselves and without Congressional authority has abandoned such immunity in time of war or emergency when its preservation is most important.

If the master and crew should be held to be employees of the agents so that the latter become thereby the operators or owners *pro hac vice,* the vessels will also lose immunity in this country from regulation and taxation by State and local governments. In every case where vessels privately operated are subjected to such regulation and taxation, government vessels, if they are thus deemed to be privately operated, must be similarly treated. Indeed this last consideration is already of particular importance in connection with the assertion of the liability of the United States, through its agents, for State unemployment insurance taxes. In the case of government civilian seamen employed through the War Shipping Administration, the Congress has made special statutory provision for old age and survivors' insurance benefits[2] and for unemployment compensation insurance benefits.[3] If it

[2] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 App. U. S. C. 1291; 26 U. S. C. 1426 (i); 42 U. S. C. 409 (o)).

[3] Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978, 42 U. S. C. 1331–1336.

be held that the master and crew are servants or employees of the shoreside agent and not of the United States, so that the agent is the operator or owner *pro hac vice* in possession and control of the government vessel, agents will be required to collect additional taxes from both the seamen and the United States and to pay them over to the State government having local territorial jurisdiction of the vessel's agent. The point is of more than academic interest. The United States is currently resisting the attempt of the California tax authorities, based on their interpretation of *Hust* v. *Moore-McCormack Lines* (1946), 328 U. S. 707, to collect over ten million dollars as unemployment insurance taxes on account of War Shipping Administration seamen. Such payment, moreover, will be without any corresponding increase in benefits to either the seamen or the Government since Congress has already made special provision for unemployment benefits in such cases.

Finally, if the master and crew are employees of the shoreside agent, the latter is the operator or owner *pro hac vice* in possession of the Government's vessel. Thus the United States will be required to defend before juries in the state courts suits brought against agents because of damage or collision alleged to result from negligent operation, navigation and management of its vessels by the master and crew. The dangers of this result are tremendous. In time of war litigation seeking to fix responsibility for such collisions involves convoy and routing instructions, the details of swept channels and other harbor defense procedures, the operation of secret detection and navigation equip-

ment, and countless other matters of the highest secrecy. During the recent war the Supreme Court of the United States by special admiralty rule effective in all United States courts provided for the impounding of pleadings and the hearing of cases *in camera* in order to protect the national interest in these respects.[4] No such action could be effectually taken if cases are to be tried before juries and in the state courts. If the master and crew are employees of the agents, foreign powers will need only to arrange for the filing of a state court suit against an agent and secrecy will fly out of the window.

To a lesser extent the same problem of secrecy may be presented even in cases of personal injuries where they occur on the high seas. Not only do many cases of personal injury arise from collision, but even when they do not, questions of defense procedures and defensive installations are frequently involved.[5] Indeed, at the time of the enactment of the War Shipping Administration (Clarification) Act, Congress, despite the insistence of the representatives of the seamen's unions (See *infra,* pp. 68–71), expressly refused to grant seamen the right to jury trial even where the suits were to be in the federal courts where it could

[4] General Admiralty Rule 46, as amended June 8, 1942 (316 U. S. 717). Such collision risks are not insured by the Government and the defense is conducted solely by attorneys of the Department of Justice assisted by representatives of the services involved.

[5] In admiralty, General Admiralty Rule 46 is, of course, equally applicable. Such personal injury risks are covered by protection and indemnity insurance procured by the Government. Defense is conducted by private attorneys appointed by the underwriters to act as of counsel to the United States Attorney for the district involved.

take steps to enforce secrecy. To hold that the Government's shoreside agents are the operators or owners *pro hac vice* so as to be subject to suit for the acts of the master and crew of the Government's vessels defeats the intention of Congress and brings such matters before juries in state courts with inevitable destruction of national security.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, i. e., the Jones Act (46 U. S. C. 688), and Federal Employers' Liability Act (45 U. S. C. 51), and R. S. 1753 (5 U. S. C. 631), together with the applicable Civil Service Rules, are set forth in Appendix A, pp. A–1 *et seq.*

STATEMENT

Appellant Watson, a civilian government seaman, appeals from a decree awarding him maintenance in the sum of $52.50 and damages under the Jones Act in the sum of $400.00, consisting of $300.00 for loss of wages and $100.00 for pain and suffering.

Appellee Deconhil was a shoreside agent of the United States employed as a ship's husband or general agent under the standard form of service agreement with the War Shipping Administration. Its duties were to "manage and conduct" the accounting and certain other shoreside business of the S. S. *Mesa Verde* and other vessels owned by the United States and operated by the War Shipping Administration to the extent and in the maner which the Government by "directions, orders or regulations" might from time to time prescribe. War Shipping Administration Form

GAA 4–4–42, 46 Code of Fed. Regs., 1943 Cum. Supp., p. 11427, sec. 306.44 (7 F. R. 7561).

Watson was a civilian employee of the War Shipping Administration engaged as a member of the crew of the *Mesa Verde,* a vessel built and owned by the United States and operated by the War Shipping Administration. Watson was procured for engagement by the Master of the *Mesa Verde* through Deconhil in accordance with Article 3 A (d) of the standard form agreement that "the general agent *shall procure and make available to the master for engagement by him the officers and men required by him* to fill the complement of the vessel." Watson signed shipping articles with the vessel as a wiper (Rspt.'s Exh. A, R. 19). These articles, which constituted Watson's contract of employment, were in the standard form provided by the Coast Guard in accordance with law and took the shape of an agreement between the master on the one hand and the various seamen on the other. They stated that Watson's employer, described as the "Operating Company on This Voyage," was "United States of America, War Shipping Administration" whose address was stated to be in care of "Deconhil S. S. Co., Gen. Agents, 311 California St., San Francisco, Cal." Such employment on a government-owned and operated ship made Watson an unclassified civil service employee of the United States under Section xxi (1) of Schedule A to the Civil Service Rules, 5 Code of Fed. Regs., 1943 Cum. Supp., p. 1488, sec. 50.21 (see Appendix, pp. A–2–3). A copy of the articles stating these facts concerning Watson's employment was re-

quired by law to be kept posted where they could be read by the crew at all times during the voyage (46 U. S. C. 577) and it is not contended by Watson that they were not visible at all times or that he was not fully aware of the identity of the Government as operating owner of his ship and of his status as a civilian employee of the United States.

Watson was injured December 2, 1946 in consequence of stepping into a bucket negligently left on the steps of a stairway or ladder aboard the *Mesa Verde*. He could without question have recovered from the United States as operating owner in possession and control of the vessel. Instead, he brought this suit in admiralty against Deconhil, the Government's shoreside agent without joining his employer, the United States. Watson's libel alleged that Deconhil "was and is the operator of and owner *pro hac vice* of" the *Mesa Verde* (Art. III, R. 4), and that it was Deconhil's duty "to furnish libelant with a reasonably safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of said work; to hire skillful and careful employees and not to retain those found careless or unskillful; to promulgate and enforce proper rules in relation to the foregoing and to inspect such materials, appliances and means" (Art. IX, R. 5–6). Deconhil's answer, in addition to other pertinent denials, expressly denied the allegations that it was operating the vessel or owed respondent any such duties (Art. III, R. 9; Art. IX, R. 10).

The case was tried to the district court on the oral testimony of appellant Watson and of Captain Rathbun, the Master of the *Mesa Verde* at the time of the accident. The court stated findings of fact and conclusions of law in the course of which he found as a fact that the allegations of the libel that Deconhil was operator and owner *pro hac vice* of the *Mesa Verde* (Fng. I, R. 14), and that Deconhil owed Watson a duty to furnish him a safe place to work and safe appliances, employees, etc. (Fng. VI, R. 15) were true. The court concluded as a matter of law that Watson was entitled to recover maintenance and damages totaling $452.00 plus costs (R. 16). Appellant Watson appeals on the ground that the damages awarded by the court below were inadequate.

REASONS REQUIRING DISMISSAL OF THE LIBEL

The United States prays that this Court fully review the record brought here by appellant Watson in all its aspects and order the dismissal of his libel on the merits because of his failure to establish any liability on the part of appellee Deconhil. This case is before this Court for a trial *de novo*. An admiralty appeal from the district court to the court of appeals is a new trial in which the appellate court may reverse the decree below and exonerate even in favor of one who, like appellee Deconhil in this case, has not appealed. A cross appeal is not required and without it this Court may direct the entry of whatever decree may be appropriate to express its own opinion respecting the findings of fact and conclusions of law. It well settled that it may disallow in favor of the appellee the whole

or any part of the award made in the district or may dismiss the libel. E. g. *Reid* v. *American Express Co.* (1916), 241 U. S. 544, 547–548; *Irvine* v. *The Hesper* (1887), 122 U. S. 256, 266; *The Mary Ethel* (2d Cir., 1923), 294 Fed. 525, 527, reversed on other grounds, 265 U. S. 257.

The many cases supporting the doctrine that no cross appeal is required are too well known to require citation or discussion. E. g. *The John Twohy,* (1921) 255 U. S. 77; *Standard Oil Co.* v. *Southern Pacific Co.,* (1925) 268 U. S. 146, 155; *The San Rafael,* (9th Cir., 1905) 141 Fed. 270, 275, cert. den. 200 U. S. 619. See 4 Benedict, *Admiralty,* (6th Ed., 1940) pp. 58–61, collecting the cases. We submit that the public interest requires that courts on their own motion protect both the litigants and others who may be effected by the litigation and insure correct administration of the judicial process. A trial in court is not a purely private controversy of no importance to the public. The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted. *N. Y. Central R. R. Co.* v. *Johnson,* (1929) 279 U. S. 310, 318. Judges are not mere referees or moderators between counsel. *Herron* v. *Southern Pacific Co.,* (1931) 283 U. S. 91, 95; *Quericia* v. *United States,* (1933) 289 U. S. 466, 469. This Court should accordingly exercise its full powers to protect the public interest and correct the error of the court below in holding the Government's shoreside agent the operator and owner *pro hac vice* of the Government's vessels so as to be liable to appellant Watson.

The court below gravely misinterpreted and misapplied *Hust* v. *Moore-McCormack Lines* (1946), 328 U. S. 707, by failing to dismiss the libel herein as required by *Lubinski* v. *Alaska S. S. Co.* (9th Cir., 1946), 153 F. 2d 1013, where this Court held that "The United States, acting through its agent the War Shipping Administration, had complete charge and authority over the ship and crew" and affirmed the dismissal of the general agent. See also *Williams* v. *American Foreign S. S. Corp.* (S. D. N. Y., 1945), 65 F. Supp. 900, 901–902; *Murray* v. *American Export Lines* (S. D. N. Y., 1943), 53 F. Supp. 861. *Hust* was a decision in the great tradition of the Jones Act; a natural link in the process of liberalizing the protection of all maritime workers.[6] Just as *Jamison* v. *Encarnacion,* (1930) 281 U. S. 635, 640, construed "negligence" to include wilful misconduct. Just as *Uravic* v. *Jarka Co.* (1931), 282 U. S. 234, 239, and *O'Donnell* v. *Great Lakes Co.* (1943), 318 U. S. 36, 39, held that "in the course of his employment" included cases where the injury was on a foreign ship or on the land. Just as *International Stevedoring Co.* v. *Haverty* (1926), 272

[6] By the Jones Act (46 U. S. C. 688) "any seaman" injured "in the course of his employment" is granted the benefit of the provisions of the Federal Employers' Liability Act (45 U. S. C. 51 *et seq.*), giving railway employees a right of recovery for injuries resulting "from the negligence of any of the officers, agents or employees" of the railway. The right to maintain suit under the Jones Act is an outstanding gain to maritime workers wherever negligence of the defendant's agents or employees exists. The longer statute of limitations provided by the federal act applies; recovery for wrongful death is not limited in amount; the benefit of the proportionate fault rule in contributory-negligence cases can be had without sacrifice of the right to trial by jury.

U. S. 50, 52, had construed "seamen" when used in the Jones Act to include longshoremen. So *Hust* completes the liberalization of the statute by holding that "employer" in respect of the Jones Act, as in the National Labor Relations Act and the War Labor Disputes Act, is not confined to employer in the common law sense but includes "any person acting in the interest of an employer, directly or indirectly" (29 U. S. C. 152 (2)). See 328 U. S. at 724, citing *Labor Board* v. *Hearst Publications* (1944), 322 U. S. 111, 120. Thus the Supreme Court concluded in *Hust* that the common law employer-employee relationship was not required to constitute "employment" as used in the Jones Act in authorizing the bringing of the statutory action, but that the benefits of that Act might be invoked by maritime workers in every case where recovery is sought for the alleged negligence of any defendant acting on behalf of a ship. That the owner seeks to have his ship operated with the advantages of division of labor should not nullify the worker's right to maintain the statutory action. Cf. *Seas Shipping Co.* v. *Sieracki* (1946), 328 U. S. 85, 96.

But to hold, as did the court below, that a party thus sued under the Jones Act is liable not only for the negligence of its own agents and employees, but even in the total absence of fault on its part or on the part of those who are its own agents or servants, must respond in damages for the negligence of the master and crew who are exclusively the independent agents and employees of its principal, the United States, in the navigation and management of the vessel, is contrary to

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the tradition of the Jones Act. And here, we submit, is where the court below fell into error. The gravamen of the seaman's action under the Jones Act is injury resulting from negligence imputable to the defendant who is being sued—negligence of those who are its servants or agents in doing its work. The Jones Act is not a workmen's compensation act. *DeZon* v. *American President Lines* (1943), 318 U. S. 660, 665, 672; *Cortez* v. *Baltimore Insular Line* (1932), 287 U. S. 367, 377. Recovery in a Jones Act suit can be had only for the negligence of those who are agents or servants of the defendant. The court below, however, not content to follow *Hust* and hold that Deconhil was the "employer" of appellant Watson for the purpose of his *bringing the statutory action* under the Jones Act, erroneously found that Deconhil was the operator and owner *pro hac vice* of the Government's vessel and therefore, of course, answerable for the negligence of its master and crew and subject to an obligation to furnish appellant Watson with maintenance and cure during his illness.

We believe that rightly understood, the decisions of the Supreme Court in *Caldarola* v. *Eckert* (1947), 332 U. S. 155, of this Court in *Lubinski* v. *Alaska S. S. Co.,* 153 F. 2d 1013, and of the Second Circuit in *Shilman* v. *United States et al.,* 164 F. 2d 649, certiorari denied February 16, 1948, show that the United States, as operating owner of the vessel, and not Deconhil, its shoreside agent, was the principal who is alone liable for the torts and contracts of the ship, her master, and crew. Those decisions establish that shoreside agents, such as Deconhil, cannot be held

liable as principal since they are not operators or owners *pro hac vice* of the Government's vessels so as to be chargeable with the acts of the master and officers. In *Caldarola* the Supreme Court said (332 U. S. at 159–160):

> The United States, as *amicus curiae,* submitted what we deem to be conclusive considerations against reading the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel. The consequences, to both the national and international interest of the United States, of such a construction would be too far-reaching to warrant such a forced reading merely in order to have a basis on which to build liability under the law of New York. Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised. After all, the question is not whether petitioner may be compensated for his injury. Congress has made provision for that. Petitioner insists, in order to enable him to sue in the courts of New York, that the Agents are to be deemed, as a matter of federal law, owners of the vessel *pro hac vice* * * *. We reject this construction. * * * Our previous decisions do not require it.

In *Shilman* v. *United States,* the Court was urged to hold that Grace Line, which, like Deconhil in the case at bar, was the Government's agent under the standard form GAA–4–4–42 agreement, was the principal responsible for the acts of the master. In that case the acts for which liability was sought to be imposed

were not, as here, also a tort of the crew, but an alleged breach of the contract of employment of a crew member, just as was Watson's claim for maintenance here. The Court observed that clearly with respect to any party but the United States, such circumstances would not impose the liability of a principal upon one who was an agent for a disclosed principal. Said the court (164 F, 2d at 652):

> His claim against Grace Line, Inc. [the Government's agent] stands however on a different footing and was properly dismissed because it arose out of a contract of employment by the United States as a disclosed principal and therefore may not be asserted against its agent Grace Line, Inc.
>
> The Shipping Articles are the basis of the contract of the libelant for his wages. They were signed by the master and the seamen. The printed form containing the particulars of the engagements of the crew recited the name of the ship, her official number, her registry and tonnage and set forth "War Shipping Administration," and on the line below "Grace Line, Agents," under the printed designation of "Registered Managing Owner or Manager." All these descriptive terms were printed under the words "Articles of Agreement Between Master and Seaman in the Merchant Service of the United States" set out in bold type.
>
> There can be no doubt that such an agreement if made with another than the United States would not render the agent for a disclosed principal individually liable. Restatement Agency, Section 320, provides that: "Unless otherwise agreed, a person making or pur-

porting to make a contract with another as agent for a disclosed principal, does not become a party to the contract."

The General Agency Agreement between the United States acting through the Administrator, War Shipping Administration, and Grace Line, Inc., provided in Article 1 that:

"The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time."

We can discover no reason for attributing the liability of a principal to Grace Line, Inc., under such an "Agency Agreement."

But it is said that the libellant was an employee of the Grace Line under the ruling of the Supreme Court in *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707. That decision was rendered in an action to recover under the Jones Act damages arising from negligence imputed to the operating agent. In *Caldarola* v. *Eckert,* 332 U. S. 155, a stevedore who sued the general agent in the New York Courts for injuries caused by a defective boom on the vessel on which he was working was denied recovery from the agent. In neither the *Hust* nor the *Caldarola* decisions did a majority of the court hold the agent to be owner of the vessel *pro hac vice.* In the first case he was only held to be subject to the obligations of an employer so as to be liable to seamen in tort for acts of negligence connected with the operation of the vessel. In each case the court was highly divided but in neither did it decide that the agent was so far the employer as to be liable to the

> seamen for their wages or other contractual obligations.

By these decisions it is now settled that, as operating owner in possession and control, the United States, not its agent, was the principal whose work the Master and crew were doing in the navigation and management of the vessel and that the United States alone is the principal liable for the torts they commit and the contracts they make in doing the work of the United States in operating the vessel.

That Deconhil as ship's husband "procured" the master and crew for engagement as employees of the United States does not make them agents and servants of Deconhil so as to render it responsible for their acts. It is elementary that when a principal, such as the United States, authorizes an agent, such as appellee Deconhil here, to engage on its behalf other agents and employees, such as the master and crews of its vessels, the principal alone, and not the agent procuring the engagement, is responsible for the torts and contracts of such other agents and employees. In the words of the *Restatement of Agency* (§ 79, comment (a)):

> The agents so employed are agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection.

And to the same effect see 1 Labatt, *Master and Servant* (2d ed. 1913), pp. 102–103:

> It is well settled that, where an employee, acting under the express or implied authority of his principal, engages servants to perform work for the benefit of his employer, the principal, and not the employee, is in law the master of the servants so engaged. This doctrine is an obvious and necessary consequence of the fact that, in the case supposed, the power of controlling the servants, even though it may normally be exercised by the agent after they are hired, really resides in the principal, and may at any time be called into active exercise.

But even if appellee Deconhil could be regarded as in some special sense the "employer" of the master and crew of the Government's vessels as suggested in the *Hust* case, still it was not the owner *pro hac vice* or operator of the Government's vessels and the work of the masters and crews of the vessels in the course of which their negligence brought about the injury of appellant Watson was the work of the United States as operating owner and not the work of appellee Deconhil. Accordingly, not appellee Deconhil but only the United States is liable for appellant Watson's injuries. This is settled by *Denton* v. *Yazoo & M. V. R. R. Co.* (1932), 284 U. S. 305, and many other cases holding that the loaned servant rule applies to the United States and that plaintiffs have no right to recover from private companies for the negligence of employees who, although hired by the private company, are engaged in doing the work of the United States at the time the injury is inflicted.

Nor can the rules of undisclosed principal avail Watson. He was fully advised that he was employed

by the Government. The shipping articles which were his contract of employment and which he signed with the master before a United States Shipping Commissioner expressly stated that the "operating company on this voyage" was the United States of America, War Shipping Administration. He makes no contention that the copy of the articles required to be posted in the crews quarters in order to inform seamen of just such facts (46 U. S. C. 577) was not visible at all times or, indeed, that he did not know that he was a civilian employee of the United States.

Nothing in *Brady* v. *Roosevelt S. S. Co.,* (1943) 317 U. S. 575, and *Hust* v. *Moore-McCormack Lines,* (1946) 328 U. S. 707, suggests that the Supreme Court intended to overturn the established rule that liability in suits under the Jones Act is grounded upon the negligence of those who are the "officers, agents or employees" of the defendant in doing the work in which the injury is caused or to abandon the rule of *respondeat superior* by which the negligence of such officers, agents or employees is imputed only to the principal in the course of whose work the acts of negligence are committed. *Brady* does not touch the "different question" of whether the Government's agent is liable (see *Brady,* 317 U. S. at 585). *Hust* does not alter the fundamental legal relationship so as to make Deconhil the master or employer for purposes of ultimate control within the *respondeat superior* rule (see *Hust,* 328 U. S. at 723), or within the rule of ownership *pro hac vice* (see *Caldarola,* 332 U. S. at 159). Indeed, the four-judge decision in *Hust* as interpreted by the five

judges in *Caldarola* did not reach the question of Hust's right *to recover* at all but only held he might *maintain* the statutory action.

ARGUMENT

I

The power and authority of general agents stops at the water's edge; they do not have possession or control of the Government's vessels

1. *Not appellee Deconhil but the United States was the operator of its vessels in exclusive possession and control at the time of appellant Watson's injuries.*— Consideration of the agreements and regulations of the War Shipping Administration together with the applicable statutes of Congress makes it plain that appellee Deconhil in acting as general agent for the United States had no possession or control over the physical operation of the Government's vessels but that, on the contrary its authority stopped at the water's edge. It is equally plain that it had no authority or control over the conduct of the masters and crew in the management of the vessels and their equipment so as to be held liable for their torts under the rules of *respondeat superior.* It was only a ship's husband appointed as "manager" of certain aspects of the ships' "business" which took place ashore. It was not the operator of the vessels. It follows that it cannot be treated as operating owner or in possession and control.

For many years the Government has been engaged in peace and in war in the operation of a fleet of cargo vessels. Wartime operations have followed a

pattern entirely distinct from that followed in peacetime. During World War I the Government's vessels were directly operated by the Shipping Board. With the return of peace, however, direct government operation ceased and the vessels were turned over to operating agents who were owners *pro hac vice* in possession and control of the Government's vessels. See *U. S. Fleet Corp.* v. *Greenwald* (2d Cir. 1927), 16 F. 2d 948, 951; *Stewart* v. *U. S. Fleet Corp.* (E. D. N. Y., 1925), 7 F. 2d 676, 678. Finally, the Merchant Marine Act, 1936, directed the United States Maritime Commission to arrange for the operation of its vessels by bareboat charter to private operators. In such bareboat operation the private operators were owners *pro hac vice* or operating owners in possession and control of the vessels and employed their own shipmasters and berth agents. The United States was a mere reversionary "general owner" and not in possession or control. In order to assure operation of lines in unprofitable trades, however, the 1936 Act provided that if it should be impossible to find private operators willing to operate the vessels under bareboat charter, the Commission might arrange temporarily for their operation under whatever arrangements the Commission should find advantageous (46 U. S. C. 1194, 1197 (c)). Under this authority the Commission adopted the special demise form of operating agency, employed during 1937 to 1940, which was involved in the cases of *Brady* v. *Roosevelt S. S. Co.* (1943), 317 U. S. 575, *Quinn* v. *Southgate Nelson Corp.* (2d Cir., 1942), 121 F. 2d 190, cert. den. 314 U. S. 682, and *Odgaard* v. *Cosmopolitan Shipping Co.,*

1939 A. M. C. 1038, 171 Misc. 244, 12 N. Y. S. 2d 389. This special form of agreement, generally known as the "Roosevelt agreement" from the Supreme Court case of that name, was executed with only four agents. It was an operating agency agreement under which the four agents were made owners *pro hac vice* or operating owners in possession and control of the Government's vessels which they manned, victualed and navigated with masters and crews of their own selection. In this type of operation, the Government granted full possession and control of its vessels to the private operators in substantially the same manner as if they had been bareboat charterers of the vessels. This method of operation continued until the sale in 1940 of the last of the government-owned shipping lines. Thereafter all government-owned cargo vessels were exclusively under bareboat charter until the resumption in the spring of 1942 of direct government operation.

During World War II, the Government's vessels were again directly operated by the War Shipping Administration and it is with this direct government operation that we are here involved. In conducting these direct operations of its vessels the United States, like other ship operators, has made use of the three coordinate classes of agents usual in the conduct of the shipping business—the shipmaster, the ship's husband or general agent, and the consignee of the ship or berth agent—each responsible directly to the United States as operating owner for the matters with which they are respectively entrusted and none of them exercising con-

trol or authority over the others.[7] It employs experienced shipmasters as its agents for the physical operation and management of its vessels afloat and experienced steamship operators both as general agents to "husband" its ships or manage the accounting and other shoreside business operations and as berth agents to manage the operations of obtaining and discharging cargo and other port services. (See Appendix, *infra,* pp. A–8, A–12–A–15, A–19 *et seq.*

The masters engaged by the United States to navigate and physically manage its vessels afloat are currently employed on the terms of the customary maritime usages and the general maritime law. (Sec. 2 Parsons, *Shipping* (1869), pp. 3–13; Bouvier, *Law Dictionary* (1934), "Master of a Ship.") They accordingly have physical possession, custody and control of the vessels afloat as the direct representatives of the United States as operating owner. They have, in accordance with the law maritime, exclusive authority to employ and discharge seamen subject to general instructions from the Government as owner. (*Butler* v. *Boston & Savannah S. S. Co.,* (1889) 130 U. S, 527, 554; *Farrel* v. *McClea,* (1788) 1 Dallas 392, 393; *Hughes* v. *Southern Pacific Co.,* (S. D. N. Y., 1918) 274 Fed. 876.

[7] The classical exposition of the coordinate functions of shipmasters and ships' husbands has always been that of Justice Story and continues to be substantially accurate to this day. Story, *Agency.* § 35, Ship's Husbands, § 36, Masters of Ships. Berth agents are to some extent a later development. In Story's day vessels did not operate on routes or schedules and obtaining and delivering cargo, if not left to the master, was entrusted to another agent afloat—the supercargo. Today a port agent is necessary to look after the cargo at the berth and perform related duties.

The experienced steamship operators engaged by the United States to husband its vessels are designated "general agents." They are employed on terms which are substantially in accord with maritime custom (See Story, *Agency,* § 36; 1 Parsons, *Shipping* (1869), pp. 109–114; Bouvier, *Law Dictionary* (1934), "Ship's Husband"), and are fully described in the standard form of general agency agreement designated "GAA–4–4–42." (Title 46 Code of Fed. Regs., 1943 Cum. Supp. p. 11427, sec. 306, 44; 7 Fed. Reg. 7561). They are usually but not invariably the channel through which instructions from the United States as operating owner are relayed to the masters of the vessels whose shoreside business operations they manage. The operators employed to render port service are designated "berth agents." They are currently employed on terms which are substantially the same as in commercial shipping operations and are fully described in the standard form of berth agency agreement (see letter of General Counsel, U. S. Maritime Commission, Appendix, *infra,* pp. A–13–A–14).

The division of duties between the general agent and berth agent for a vessel makes it abundantly plain that on neither of them has the United States conferred the operation or the possession and control of its vessels. The duties of both these shoreside agents and the method of operation are fully explained in the letter of the General Counsel U. S. Maritime Commission (Appendix, *infra,* pp. A–19–A–24). The coordinate and correlative functions of general agents and berth agents show plainly that only the Government as principal

of all three agents, shipmaster, ship's husband and berth agent, is the operator of the ship.

Nowhere in the GAA–4–4–42 agreement is there found any language amounting to a demise or delivery to the general agent of the physical possession and control of the vessels assigned to him. The agent is a mere "manager" of certain shoreside aspects of the ship's "business." On the contrary, the agreement makes it plain that the master as the direct agent of the United States as operating owner is in exclusive possession of his ship. As pointed out by the General Counsel, U. S. Maritime Commission (Appendix, *infra,* pp. A–15–A–19), there is a striking difference in the standard form of general agency agreement here involved and the exceptional operating agency agreement involved in *Brady* v. *Roosevelt Steamship Co.* (1943), 317 U. S. 575; *Quinn* v. *Southgate Nelson Corp.* (2d Cir., 1942), 121 F. 2d 190, cert. den. 314 U. S. 682 and *Odgaard* v. *Cosmopolitan Shipping Co.,* 1939, A. M. C. 1038, 171 Misc. 244, 12 N. Y. S. 2d 389.

By the Roosevelt agreement the United States turned over the vessels themselves *to be operated* by a cost-plus contractor designated "Managing Agent" as owner *pro hac vice* and the latter, and not the United States, manned the vessel with a master and crew employed as its own servants. The Roosevelt agreement (see Record in *Brady* v. *Roosevelt Steamship Co.,* No. 269, October Term, 1942, pp. 21–32) stated, "The Managing Agent has indicated its willingness to undertake the management and *operation* of the line, * * *. The Owner hereby designates the Managing Agent as its Managing Agent to man-

age, *operate* and conduct the business of the Line" (Art. 1); "The Managing Agent *shall manage and operate the said vessels* exclusively under the trade name American Pioneer Line" (Art. 4); "The Managing Agent agrees to *man, equip, victual, supply and operate* the vessels, subject to such restrictions and in such manner as the Owner may prescribe * * *. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner" (Art. 7); "The Owner may terminate this agreement * * * in case of * * * any assignment, transfer, agreement or arrangement whereby the *management or operation of the above described Line or vessels* shall be divested from the Managing Agent" (Art. 25).

By the GAA–4–4–42 agency agreement, on the other hand, the United States retains direct control of the vessel's navigation and management. And it is well established that where the general owner thus retains the possession, command, and navigation of a vessel, he continues to be the operator and the agreement does not constitute a demise, divesting the general owner and making the other party owner *pro hac vice* or operating owner. On the contrary, the entire legal responsibility of ownership and operation remains in the general owner. *Reed* v. *United States* (1870), 11 Wall. 591, 600; *United States* v. *Shea* (1894), 152 U. S. 178. It is well settled that if there is any doubt that the general owners have divested themselves of possession and control and constituted another the owner *pro hac vice* or operator "then the general owners must be deemed such for their rights and authority

continue until displaced by some clear and determinate transfer of them; * * * The legal presumption is in favor of the continuance of ownership and against any transfer." See *Hagar* v. *Clark* (1879), 78 N. Y. 45, 50; *Raymond* v. *Tyson* (1854), 17 How. 53, 63–64; *Pacific Imp. Co.* v. *Schubach-Hamilton S. S. Co.* (W. D. Wash., 1914), 214 Fed. 854; *Grimberg* v. *Columbia Packers' Assn.* (1905), 47 Ore. 257, 270–271, 83 Pac. 194. As such an operating owner the Government alone is liable. *The Volund* (2d Cir., 1910), 181 Fed. 643, 665–667; cf. *Thorp* v. *Hammond* (1870), 12 Wall. 408, 416.

The standard form GAA–4–4–42 agency agreement under which Appellee Deconhil and other general agents are employed by the United States to husband its vessels provides that they are employed "as its agent and not as an independent contractor to manage and conduct *the business* of vessels assigned to it" (Art. 1). The general agent agrees to *conduct the business* of the vessels "for the United States, *in accordance with such directions,* orders, or regulations" as the United States may prescribe (Art. 2). The general agent undertakes to "maintain the vessel in such trade or service as the United States may direct" (Art. 3A (a)); "equip, victual, supply and maintain vessels *subject to such directions,* orders, regulations and methods of supervision and instruction as the United States may from time to time prescribe" (Art. 3A (c)); "arrange for the repair of vessels * * * including maintenance and voyage repairs and replacements" and "exercise reasonable diligence in making inspections and obtaining infor-

mation with respect to the state of repair and condition of the vessels" (Art. 14).

In accordance with the immemorial custom touching ships' husbands, the standard form agreement makes it the duty of general agents to "procure" the master and crew for the vessels husbanded by them. *Article 3 A (d)* of GAA 4–4–42 directs the agent to "*procure* the master of the vessels operated hereunder, subject to the approval of the United States." It thus makes plain that the agent may not supply its own master, nor may it act as operating agent of the vessels. The agent is confined to *procuring* a master for acceptance or rejection by the United States. The agreement directs that the master so procured shall be an "agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." Thus it emphasizes that the agent may not itself give any orders whatsoever with respect to the navigation and management of the vessel to the master, who is declared to be an agent of the United States subject only to independent government orders with respect to such matters. Such orders as the agent may appear to give, in fact, it merely passes on after receiving from the War Shipping Administration.

The agreement further directs that the general agent "shall *procure and make available* to the master *for engagement by him* the officers and men required *by him* to fill the complement of the vessel." The GAA 4–4–42 agreement thus denies the agent authority even to employ officers or men on behalf of the Government. The

function of employing a crew for the United States is vested exclusively in the master as an independent agent of the Government. Respecting the method of procurement, the agreement directs "Such officers and men shall be procured by the general agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time." So again the GAA 4–4–42 agreement emphasizes that the agents's authority is to stop at the water's edge and prohibits the agent from interfering in the slightest with the management of the vessel itself. Thus the agreement requires that "the officers and members of the crew shall be subject only to the orders of the master." It concludes that the officers and crew "shall be paid *in the customary manner,*" that is to say, in cash, "with funds provided by the United States hereunder."

Reviewing the procedure for manning the vessels under GAA 4–4–42, we may state the steps in logical sequence as follows:

1. The master once "procured" by the agent and employed by the United States is the "agent and employee of the United States," not of the agent.

2. The crew is "procured" by the agent through the usual channels, that is to say, the union hiring halls, and is "made available" to the master "for engagement by him" as an independent agent of the United States, not for engagement by the agent.

3. The master "shall have and exercise full authority" over the vessel's "navigation and management"

and the officers and members of the crew are "subject only to the orders of the master." The agent has no authority or duties aboard; its powers stop at the water's edge.

4. The officers and crew are to be paid "in the customary manner with funds provided by the United States," that is to say, in cash by the master or his representative.

This whole arrangement thus adheres consistently to the Government's purpose that the general agent under GAA 4–4–42 shall not be an "operating agent" as in the *Brady, Quinn,* and *Odgaard* cases, *supra,* but a mere ship's husband whose authority stops at the water's edge and who is only to operate the "business" of the vessel and have no part in the manning, navigation, management, or other functions of operating the vessel itself.

The seamen thus employed, like all merchant seamen, sign the statutory form of shipping articles before a United States Shipping Commissioner (46 U. S. C. 564, 713). These articles constitute a contract executed by and between the master as agent for the operating owners of the vessel and each member of the crew. See *Hughes* v. *Southern Pacific Co.* (S. D. N. Y., 1918), 274 Fed. 876. This prescribed form requires that the name and address of the "Operating Company for the Voyage" or "Registered Owner or Manager" be expressly stated and a copy of the form showing that information is "to be placed or posted up in such part of the vessel as to be accessible to the crew" (46 U. S. C. 577). And in order that government seamen should be clearly informed of their

status, the regulations prescribed that the shipping articles be filled out to state in the space for the name of the registered owner or operating company for the voyage "United States of America, War Shipping Administration," and in space for the address "c/o XYZ Company, General Agent," giving the address of the agent (War Shipping Administration Operations Regulation No. 88 Revised). In addition the copy of the articles which is posted in the forecastle is customarily imprinted with a rubber stamp stating that members of the crew are not employees of the agents but exclusively employees of the United States War Shipping Administration.

2. *The Executive and Legislative branches of the Government have consistently recognized that the United States is the employer of the crews of War Shipping Administration vessels.*—Consideration of the agreements and regulations of the War Shipping Administration, together with the applicable statutes, make it equally plain that not only was Deconhil not operator of the vessel, but it was not the employer of the officers and crew of the vessel in the sense necessary to render it liable for their negligence. It was a mere ships' husband or "manager" of certain aspects of the vessel's shoreside "business." The circumstance that as a result of its duty under the agency agreement to "procure" seamen for engagement by the master on behalf of the United States, such seamen may be deemed "employees" of the agent within the technical meaning of that term in the Jones Act (see *Hust* v. *Moore-McCormack,* (1946) 328 U. S. 707) is not, as

the Court held in *Shilman* v. *United States, et al.* (2d Cir., 1948), 164 F. 2d 649, 652, dispositive of the question here. On the contrary it is well settled that the agent procuring the employment of others in such a manner is not responsible for the contracts or torts resulting from their acts. In the words of the *Restatement of Agency* (§ 79, Comment (a)): "The agents so employed are agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection."

A. The executive branch of the government has always recognized such seamen to be government employees. By reason of their employment on government-owned vessels operated by the War Shipping Administration as successor to the Maritime Commission, they are unclassified civil service employees of the United States. Civil Service Rules, Schedule A, sec. xxi (1), 5 Code of Fed. Regs., 1943 Cum. Supp., p. 1488, sec. 50.21. (Executive Order No. 9004, 7 Fed. Reg. 2, 3; Executive Order No. 9247, 7 F. R. 837). For all claims and causes of action arising prior to the Clarification Act, the United States Employees' Compensation Commission granted benefits to such seamen under the United States Employees' Compensation Act, 1916 (39 Stat. 742, 5 U. S. C. 751 *et seq.* See the Commission's 28th Annual Report (1944), p. 5.

In devising a program to accomplish its objective of direct government operation, the War Shipping Administration, after its creation on February 7, 1942, kept definitely in view the fact that such American merchant seamen employed by the government to man its vessels are nonetheless civilians, engaged in voluntary contractual employment, and that government operation of the merchant marine, however vital and closely allied to military and naval activities, was to be conducted as a civilian enterprise with civilian government employees. The wages and working conditions of the majority of merchant seamen privately employed on dry-cargo vessels were already established by a vast number of different collective-bargaining agreements between the various shipowners and the various maritime labor organizations. As vessels owned by or bareboat chartered to the Government and operated by it were destined to replace almost all privately owned and operated ships, the War Shipping Administration considered that to prevent the delay which would result from renegotiating contracts for wages, working conditions, and other aspects of employment already established by the collective-bargaining contracts in effect for privately operated vessels such preexisting agreements should be continued in effect for government-operated vessels (see letter of General Counsel, U. S. Maritime Commission, Appendix, *infra,* pp. A–11–A–12). This was the effect of the identical Statements of Policy signed by the Administrator and the various maritime unions and the War Shipping Administration has taken the position that these Statements of Policy constituted approval of all

maritime collective-bargaining agreements, not merely those of signatory unions.

These Statements of Policy were promptly implemented by a series of regulations, directives and policies, of the War Shipping Administration in order that uniformity could be achieved. Thus one of the most important aspects of the labor relations problem involved the designation of bargaining units. To meet this problem, an exchange of correspondence was had between the War Shipping Administration and the National Labor Relations Board, whereby the Administrator exercised his power to utilize the facilities of the National Labor Relations Board for the designation of bargaining units. The War Shipping Administration's rights with respect to the Board's possible jurisdiction over personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration as distinct from over the agents themselves were specifically reserved. These solutions of the collective bargaining problem were specifically considered and approved by Congress in connection with its consideration of the Clarification Act. H. Rep. No. 107, 78th Cong., 1st Sess., pp. 16–17, 23–24.

A similar practical arrangement was made in connection with the functioning of the National War Labor Board. These practical arrangements were facilitated by the statutory definition of "employer" in the National Labor Relations and War Labor Acts. As stated by the War Labor Board in its Directive Order of August 31, 1945, *In re Maritime Cases,* 26 War Lab. Rep. 509, 512: "The question

raised as to whether the operators should be named in the contract as employers, or, as in the last contract, as general agents for the War Shipping Administration, has no real significance. Whatever the designation in the contract, the operators are the employers for the purpose of this dispute, as contemplated by the War Labor Disputes Act. * * * Section 2 (d) of the War Labor Disputes Act provides that the term 'employer' shall have the same meaning as in section 2 of the National Labor Relations Act. The latter section defines an employer as 'any person acting in the interest of an employer, directly or indirectly * * *' " [29 U. S. C. 152 (2)]. See also *In re Atlantic and Gulf Coast Agents of WSA*, 16 War Lab. Rep. 23, 24, 32–36; and cf. exchange of correspondence 20 War Lab. Rep. at 465, 468.

The participation of the War Shipping Administrator, as a signatory employer of the Statement of Principles (46 Code of Fed. Regs. 1943 Supp. p. 2124; 8 F. R. 3454), creating the Maritime War Emergency Board to act in connection with questions of special compensation and bonuses for merchant seamen, was also noted and approved by Congress. H. Rep. No. 107, *supra,* at p. 17. The Maritime War Emergency Board was established on December 18, 1941, by agreement of private ship operators and maritime labor organizations to deal with problems of war compensation and bonus problems which could no longer be adequately solved by the parties because of the lack of current, accurate information. The memorandum of agreement was designated "Statement of Principles." The War

Shipping Administration became a signatory when it began to operate a substantial portion of the merchant fleet. It should be noted that the War Labor Board advised the Maritime Emergency Board that its bonus decisions need not be submitted to the former agency for stabilization review.

Not only the War Shipping Administration and National Labor Relations Board and other federal agencies but the states as well have always recognized WSA seamen as employees of the United States and the vessels as operated by the government. Their general immunity from state and local regulation and taxation has never seriously been questioned. With the exception of California, the authorities of all States which provide coverage for maritime workers in their unemployment compensation laws have refrained from collecting contributions with respect to workers on vessels operated by the War Shipping Administration and husbanded by general agents, since "it is generally understood that * * * [such] workers * * * are considered to be Federal employees." See *Issues in Social Security,* Report to the Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st Sess., p. 401; Hearings before the House Ways and Means Committee on H. R. 3736, 79th Cong., 1st Sess., pp. 703–705.

B. Congress, with the passage of the War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, expressly recognized the status of seamen serving on vessels owned by or bareboat char-

tered to the United States, through the War Shipping Administration, as employees of the United States. By that Act, Congress provided for the exercise by such seamen of rights and benefits under the Jones and Social Security Acts theretofore possessed by seamen employed by private ship operators but previously not available in all cases to those who were government employees because employed by the United States through the War Shipping Administration so that their right to United States Employers Compensation Act benefits were probably their exclusive remedy.

Prior to the date of the passage of that Act, such seamen as employees of the United States were not engaged in employment covered by the Federal Insurance Contributions Act and were not entitled to benefits under the old age benefit provisions of the Social Security Act. The Clarification Act provided for payment on behalf of such seamen and amended Section 1426 of the Internal Revenue Code (26 U. S. C., Supp. V, 1426 (i) and Section 209 of the Social Security Act (42 U. S. C., Supp. V, 409 (o)) so as to cover specifically under the definition of "employment" in those statutes the services performed by seamen employed on vessels owned by or bareboat chartered to the United States and operated by the War Shipping Administration. Without this action by Congress it was not possible for such seamen because of their government employee status, to enjoy the benefits which would have been theirs had they been employees of the general agent. The reports leave no doubt that the status of such crew members as employees of the United States was fully

recognized. See S. Rep. 62, 78th Cong., 1st Sess., pp. 5–6; H. Rep. 107, 78th Cong., 1st Sess., pp. 2, 15.

Again in connection with the Federal Employees' Pay Act of June 30, 1945, c. 212, 59 Stat. 295, 305, Congress recognized the status of WSA seamen as employees of the United States. Since they were all unclassified Schedule A employees, it was unnecessary to make provision in the act for their pay. They were, however, expressly exempted from the ceiling on the number of federal employees. Section 607 (f) provided that, "Until the cessation of hostilities in the present war as proclaimed by the President, the provisions of this section shall not be applicable to * * * individuals * * * to whom the provisions of section 1 (a) of the [War Shipping Administration (Clarification)] Act of March 24, 1943 (Public Law Numbered 17, Seventy-eighth Congress), are applicable."

Further Congressional recognition of the status of such crew members as employees of the United States is found in the provisions of the Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978–981 (26 U. S. C. 1606 (f)), which amended the Federal Employment Tax Act expressly to authorize the states to cover under their unemployment insurance laws services performed by privately employed seamen on interstate voyages. Several states, including the leading maritime states of California and New York, had already taken steps to cover such private seamen at least to the extent of vessels operated from a single state. But in order to permit all maritime states to join in an interstate agreement providing

for the exchange of wage information between the unemployment insurance authorities of the several participating states as a basis for the payment of benefits to seamen serving on vessels operating out of more than one state, it was necessary to amend the federal act so as to authorize the states to cover seamen in the same manner as other employees. In amending the act, Congress expressly excluded from such coverage crew members of vessels operated by the War Shipping Administration. Instead, Congress made specific provision for the payment of benefits to unemployed seamen formerly employed by the War Shipping Administration through general agents on vessels owned by or bareboat chartered to the War Shipping Administration and Maritime Commission.

This was accomplished by the addition to the Social Security Act of Title XIII (42 U. S. C. 1331–1336), authorizing the Federal Security Administrator to enter into agreements with the several maritime states for the payment of benefits during a so-called reconversion period lasting until June 30, 1949. Under such agreements the states will pay compensation to War Shipping Administration seamen just as if they were in fact covered under the state law and in return will obtain reimbursement from the Federal Security Administrator. In the absence of such arrangements, the Federal Security Administrator is directed to make such payments directly to the former government seamen.

The legislative history evidences express recognition that War Shipping Administration seamen were employees of the Government and not of its agents so as

to be taxable by the states. The committee reports of both houses are unanimous in this regard. Thus House Report No. 2526, 79th Cong., 2d Sess., pp. 6–7, stated one of the purposes of the provision to be:

> (2) To provide temporary protection for persons whose maritime employment has been with general agents of the War Shipping Administration and thus has been technically Federal employment.
>
> * * * * *
>
> To accomplish the second purpose of the title immediate protection is provided seamen whose employment could not have been covered by State laws because they were employed on behalf of the United States by general agents of the War Shipping Administrator. This protection in no event would extend beyond June 30, 1949.
>
> The bill provides in general that these seamen shall receive the same benefits as would have been payable had their Federal maritime employment been under the State unemployment compensation law. * * *
>
> * * * * *
>
> The committee recognizes that because of the fact that the great bulk of maritime work has been carried on by employees of the Federal Government since the beginning of the war the mere coverage of private maritime employment under the laws of the several States will not afford full protection for most maritime workers for whatever unemployment may occur in the next 2 or 3 years. The bill therefore authorizes the Federal Security Administrator to make arrangements with the States under the terms of which the States would extend credit

> for Federal maritime wages in calculating benefits under their own State laws. The bill further provides that the Federal Government will reimburse the States for such costs as are incurred in the process of crediting Federal maritime wages and paying benefits thereon, which would not otherwise have been incurred.

See also House Report No. 2447, 79th Cong., 2d Sess., pp. 7–9; Senate Report No. 1862, 79th Cong., 2d Sess., pp. 5–6.

The materials set forth above serve only as a partial illustration of the complex nature of the vital operation in which the War Shipping Administration engaged and the practical solutions which have been given to the problems which that Administration faced as it "* * * actively engaged in operating * * * the largest merchant marine in the world's history. * * *" H. Rep. No. 107, 78th Cong., 1st sess., at p. 12. At all times during this operation, the legal relationship of employer and employee between the United States and civilian seamen of this class has been specifically maintained. At no time has any action ever been taken by either Congress or the executive branch of the Government that would justify the conclusion that seamen of this class are employees of the Government's shoreside agents such as defendant-appellees.

3. *Appellant Watson makes no contention that he was not fully aware that the United States was his employer and the operator of the "Mesa Verde."*— Watson's contract of employment was the shipping articles (Rspt's Exh. A, R. 19), which were not with Deconhil, but with Captain Rathbun, the Master of

the *Mesa Verde*. By statute they were required to be read or explained to the crew by the United States Shipping Commissioner at the time of their execution and a copy was required to be posted up so as to be visible to the crew at all times (46 U. S. C. 565, 577). Appellant Watson has never denied that this was done and the shipping articles disclose that they were signed by Watson and others with Captain Rathbun on behalf of the War Shipping Administration as "Operating Company on This Voyage" and that it was indicated that Deconhil was only the agent through whose offices communication with the United States in matters concerning the vessel might be had.

Watson was thus fully informed that Deconhil was not operator or owner *pro hac vice* of his vessel. It is well settled that whoever are the operating owners for the voyage are liable on account of wages, maintenance, improper discharge and all other obligations due the seamen. But if the seaman is to recover, he must establish that the party thus sought to be held liable was in fact the operating owner and not a mere agent or time or voyage charterer, nor yet a general owner who has parted with the operation and control of his vessel to another who operates it as owner *pro hac vice*. *Shilman* v. *United States, et al.,* (2d Cir., 1947) 164 F. 2d 649, cert. den. February 16, 1948; *Everett* v. *United States Shipping Board* (9th Cir., 1922), 284 Fed. 203, cert. den. 261 U. S. 615; *The Del Norte* (9th Cir., 1902), 119 Fed. 118, 123; *The John E. Berwind* (2d Cir., 1932), 56 F. 2d 13; *Baccarat* v. *Andrew F. Mahoney Co.* (N. D. Calif.), 1933 A. M. C. 1652, 1656; *Cox* v. *Lykes Bros.* (1924), 237 N. Y. 376, 143

N. E. 226, 229; *Roberts* v. *United States Fleet Corp.* (1925), 240 N. Y. 474, 477, 148 N. E. 650, 651.

The action of the court below in holding liable an agent which merely "procured" for its disclosed principal, the United States, the master and crew which the Government employed to manage and navigate the vessel is not only unrealistic in fact but contrary to the express provisions of the statutes and the law maritime. As the court observed in *Hughes* v. *Southern Pacific Co.,* (S. D. N. Y., 1918) 274 Fed. 876—

> Shipping Articles constitute a contract executed by and between the master of a vessel as agent for the owners, and each member of the crew shipped before a United States Shipping Commissioner. The master virtute officii employs and discharges the seamen.

No basis exists for attempting to hold an agent for a disclosed principal when the agent is confined to shoreside duties.

We submit, therefore, that there is no factual basis to be found in the method of operation of the *Mesa Verde* which can justify the decision of the court below and this Court should order the dismissal of the libel.

II

The Supreme Court's decisions in *Caldarola* v. *Eckert* and *Denton* v. *Yazoo Railroad* require dismissal of appellant's libel

1. *Caldarola v. Eckert establishes that appellee Deconhil was not the operator or owner pro hac vice of the Government's vessels, but that the operation of the vessels was exclusively the work of the United*

States.—Prior to the Supreme Court's decision in *Caldarola,* some confusion existed. It was first thought that because the plaintiff in the *Hust* case had been allowed to recover from the agent, the Supreme Court meant to hold the agents to be the operators or owners *pro hac vice* of the Government's vessels. Indeed there were those who pointed out that not only had Justice Douglas and Black held in their opinion that the agent had been given possession of the vessel and was owner *pro hac vice* (328 U. S. at 735, 738), but that Justices Rutledge and Murphy in their opinion had consistently referred to the agent as the operator of the vessel (328 U. S. at 717, 718, 720, 721, 724, 727, 730, 732) which would come to substantially the same thing. It was common knowledge that the GAA–4–4–42 agreement was not intended to create an *operating* agency but only a *husbanding* agency, and had been uniformally so interpreted by the Congress and the executive branch of the Government. But until *Caldarola,* many thought that *Hust* had held that, despite the intention of Congress and the executive, the Supreme Court had determined to read the contract as an *operating* agreement making the agent the owner *pro hac vice* or operating owner for the voyage. See e. g., *Militano* v. *United States* (2d Cir., 1946), 156 F. 2d 599, 602.

In *Caldarola,* the Supreme Court dispelled this confusion. The Court confirmed that *Hust* had settled only that a maritime worker might *maintain* the statutory Jones Act suit against one acting for the vessel even though not his employer in the common law sense; not that he might recover in such a suit for the negligence of those for whom the party sued

was not subject to vicarious liability (see *Caldarola,* 332 U. S. at 159; *Hust,* 328 U. S. at 724). But *Caldarola* also established that the agent is not operator or owner *pro hac vice* of the Government's vessels, but is only a shoreside agent or ship's husband and as such is fully liable for the faults and negligence of its own officers, agents and employees, but not for those of the vessel or its operating owner, the United States.

Analysis of the Court's opinion makes this clear. In *Caldarola* v. *Eckert,* (1947) 332 U. S. 155, Caldarola, a longshoreman employed by the Government's stevedore contractor, was injured aboard a War Shipping Administration vessel. He brought suit in the state court against Eckert who was general agent for the vessel under the standard form GAA 4–4–42 agreement. Caldarola claimed his injury was caused by a defective boom and that the agent was liable for failing to maintain the vessel in sound condition. The New York Court of Appeals affirmed a decision of the Appellate Division which set aside a verdict for the longshoreman. The Appellate Division had held that nothing in the agency arrangements made the agent any more than managers of certain aspects of the ship's "business" and that the agent was not operator of the ship nor responsible as such (1946 A. M. C. 628, 270 App. Div. 563, 566.) The Court of Appeals held the agent was not the owner *pro hac vice* or operator of the Government's vessel (295 N. Y. 463, 68 N. E. 2d 444). The Supreme Court granted certiorari to resolve an alleged conflict with the *Hust* case (332 U. S. at 157). It affirmed the decision of

the New York Court. The Court's opinion said, "No doubt the petitioner could have sued the United States in Admiralty. Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 742. He chose not to do so. Presumably to obtain the benefit of trial by jury, he asked relief from New York" (p. 157). "After all, the question is not whether petitioner may be compensated for his injury. Congress has made provision for that. Petitioner insists, in order to enable him to sue in the courts of New York, that the agents are to be deemed, as a matter of federal law, owners of the vessel *pro hac vice*" (p. 159).

Overruling the dissents of the same four judges responsible for *Hust,* the other five judges unanimously rejected, as not required by its previous decisions, the construction of the agency agreement now relied on by Watson. The *Hust* case was declared by the majority opinion (332 U. S. at 159) as meaning no more than that "under the agency contract the agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.'" (332 U. S. at 159.) Recovery is thus possible wherever plaintiff has suffered any injury resulting "from the negligence of any of the officers, agents or employees" of such an "employer" (see 45 U. S. C. 51, 46 U. S. C. 688). But continued the opinion, "The Court did not hold that the agency contract made the agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him as a matter of federal law, duties of care to third persons" (p. 159). And the court made no

distinction between third persons who were seamen and those who, as Caldarola, were longshoremen. The *Brady* case was "likewise remote from the issues decisive of this case. It merely held that the Suits in Admiralty Act, by furnishing an *in personam remedy* against the United States, did not free the agent from liability for his own torts" (p. 160). Thus it appears that in the unanimous view of the five judges both *Brady* and *Hust* have nothing to do with the question of what circumstances justify imposing liability on a Government agent in favor of seamen, passengers, longshoremen or other third persons. They establish only that there is no impediment to maintaining suit.

Caldarola has thus established that the existence of the right of a seaman or other third party *to sue the agent,* whether under the Jones Act or the general maritime law and whether for tort or contract, does not *impose liability on the agent* in situations where the law of principal and agent and of *respondeat superior* does not impute to the general agent liability for the acts and neglects of the United States and those who are acting only as its servants or agents. Thus in the case at bar, appellee Deconhil was not the owner *pro hac vice* or operator of the Government's vessels. Accordingly, their operation was not the work of Deconhil and it was not liable for the fault and negligence of the master and crew which resulted in Watson's injury. The latter's unquestionable right to maintain the present suits does not carry with it an automatic right to recover for the negligence of the master and crew. Recovery

requires that Watson prove that Deconhil breached a duty which it owed to him. This he failed to do. Instead he has proven only that his injuries resulted from the negligence of the crew of the vessel. But the crew were the agents and servants of the operator of the ship, which the Supreme Court has settled in *Caldarola* is the United States and not Deconhil, the Government's agents for the management of certain aspects of the vessel's shoreside business.

2. *Denton* v. *Yazoo Railroad establishes that liability cannot be imposed on Deconhil for the negligence of the master and crew in doing work which was exclusively that of the United States.*—Since it is settled that the United States, not appellee Deconhil, was operating the vessel, the work of the vessel in the course of which appellant Watson was injured was exclusively the work of the United States. Under the name of the loaned servant rule, it is familiar that even one in the general service of an employer who is loaned to another for a particular employment is dealt with by the law as the servant of the latter with respect to anything occurring in doing the work of such an employer *pro hac vice.* In the often quoted case of *Standard Oil Co.* v. *Anderson,* 1909) 212 U. S. 215, the Court pointed out that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master. Liability is imposed because the servant was conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured (212 U. S., at

221). But, the opinion continues, "The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it" (p. 221). "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work" (pp. 221–222).

This rule has always been held applicable to the general employees of a private employer loaned to do work of the United States. In such cases it is held that, although employed and paid by their private employer, the employees while doing the work of the United States are the servants of the United States and the Government alone and not the private employer is liable for their negligence. The leading case of *Denton* v. *Yazoo & M. V. R. R. Co.* (1932), 284 U. S. 305, settles that the private general employer is not liable. There, suit for injuries was brought in the state court against the railroad and others by Denton, a United States mail clerk. Denton claimed that Hunter, a porter employed and paid by the railroad, while engaged in loading United States mail into a mail car, under the direction of a United States postal transfer clerk, had negligently injured him. It was found that as to the work in question, the porter was not under the direction or control of the railroad. The applicable regulations and contract between the railroad and the United

States required the railroad to "furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post office cars, and to load and pile the mails in and unload them from storage and baggage cars under the direction of the transfer clerk, or clerk in charge of the car" (284 U. S. at 307). Pursuant to a jury verdict, judgment was entered for Denton against the railroad and all other defendants. On appeal the Supreme Court of Mississippi reversed as to the railroad. It held the railroad was not liable to Denton because the work Hunter was doing at the time of his negligence was not that of his general employer, the railroad, but that of his employer *pro hac vice,* the United States. His negligence was therefore not imputed to the railroad. The Supreme Court of the United States affirmed. The opinion said (284 U. S. at 308–309):

> Whether the railroad companies may be held liable for Hunter's act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work or that of another, a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited. In

Standard Oil Co. v. *Anderson,* 212 U. S. 215, 220–225, this court said:

"The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

* * * * *

"To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.

* * * * *

"In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

So every similar attempt to recover from private companies for the negligence of their employees in the course of doing the work of the United States has been rejected. See *Norfolk & W. Ry. Co.* v. *Hall* (4th Cir., 1932), 57 F. 2d 1004, 1008; *McLamb* v. *DuPont* (4th Cir., 1935), 79 F. 2d 966; and cf. *Hardy* v. *Shedden Co.* (6th Cir., 1897), 78 Fed. 610, 613; *Byrne* v. *Kansas City, Ft. S. & M. RR. Co.* (6th Cir., 1894), 61 Fed. 605.

That rule is controlling here. It is thus established that it is immaterial whether the general agent, is held to be general employer of the master and crew of the Government's vessel or only "employer" within the technical meaning of the Jones Act for the purpose of enabling injured seamen to bring the statutory action against such an "employer." In neither event is any general agent liable for the negligence of the master and crew in the navigation and management of the Government's vessels. That Article 3A (d) of the agency agreement makes the master exclusively "an agent and employee of the United States" with respect to "the navigation and management of the vessel" renders it clear beyond all question that defendant-appellants here, like the railroad in *Denton's* case, are not subject to vicarious liability for the acts of the master and crew. As the Supreme Court said in *Sun Oil Co.* v. *Dalzell Towing Co.* (1932), 287 U. S. 291, of a libelant's similar attempt to extend the responsibility of the general employer (pp. 294–295): "Respondent's responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage. The provision that its tug cap-

tains while upon the assisted ship would be the servants of her owner is an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former."

The agent is not the owner *pro hac vice* or operator of the vessel. That is the work of the United States and it alone is liable. So in the circumstances here involved, the work of the master and crew was not the work of appellee Deconhil, but of the vessel's operator, the United States. Appellant Watson's undoubted right to *maintain* the present suits against Deconhil does not justify his *recovering* in the absence of proof that those who negligently injured him were doing the latter's work. This he has not proven. Instead he has proved that he was injured as a result of negligence of the master and crew who were doing the work of the operator of the ship which the Supreme Court in *Caldarola* held was the United States, not the agent. Accordingly the suit against appellee Deconhil is without legal foundation and should be dismissed.

3. *The dismissal of appellant Watsons suit compelled by the Caldarola and Denton decisions is equally required by the Brady and Hust cases.*— Nothing in the cases of *Brady* or *Hust* prevents the operation of the rule established by the *Caldarola* and *Denton* decisions which require that appellant Wat-

son's suit be dismissed. As explained by the five judges in *Caldarola,* the cases of *Brady* and *Hust* hold only that an injured third party may freely bring his action against the general agent under either the general maritime law or the Jones Act as he may deem appropriate. The explanation in the *Caldarola* opinion makes it plain that the status of the agent as "employer" extends no further than its technical application in making the statutory remedy of the Jones Act available against the agent for "negligence of any of the officers, agents or employees" of the agent itself. It does not make the agent vicariously liable for the negligence of those who at the significant moment are the agents and servants of the United States as operating owner of the vessel.

Brady and *Hust* did not alter the fundamental legal relationships of the parties so as to make the agent the master or employer of the officers and crew for purposes of ultimate control within the *respondeat superior* rule (see *Hust,* 328 U. S. at 723) nor within the rule of ownership *pro hac vice* (see *Caldarola,* 332 U. S. at 159). Thus in distinguishing *Brady* and *Hust,* the Supreme Court said in *Caldarola* (332 U. S. at 159):

> *Hust* v. *Moore-McCormack Lines, supra,* arose under the Jones Act. (Act of March 4, 1915, 38 Stat. 1185, as amended June 5, 1920, 41 Stat. 1007). We there held that under the agency contract the agent was the "employer" of an injured seaman as that term is used in the Jones Act, and a seaman could therefore *bring the statutory action* against such an "employer." The

> Court did not hold that the agency contract made the agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, *duties of care to third persons,* * * * *Brady* v. *Roosevelt Steamship Co.,* 317 U. S. 575, is likewise remote from the issues decisive of this case. It merely held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the agent *from liability for his own torts.* The *Brady* case did not reach the "different question" whether "a cause of action" against the agent had been established. 317 U. S. at 585. [Italics supplied.]

Analysis of the decisions themselves shows that no new liability was intended to be imposed. *Brady* v. *Roosevelt* (1943), 317 U. S. 575, only established that the status of government agent does not exempt the agent from suit. *Brady's* case did not arise under a *general agency* agreement like that here involved, but under a special interim form of *operating agreement* (see letter of General Counsel, U. S. Maritime Commission, Appendix, *infra,* pp. A–6, A–15 *et seq.*). This special Roosevelt agreement was specifically intended to make the agent owner *pro hac vice* or operating owner of the vessels during the time they were allocated to it, just as does a bareboat charter. The special operating agreement provided that the agent was "to manage, *operate,* and conduct the business of the line" and stated that the vessels were delivered "for management *and operation*" and that the agent undertook to "*man,* equip, victual, supply and *operate the vessels.*"

The Government reserved the right to survey at any time "the vessels *operated by the managing agent* hereunder."

But despite this language which clearly made Roosevelt the operating owner or owner *pro hac vice,* the Supreme Court was urged in the *Brady* case to hold that by reason of the Suits in Admiralty Act and Roosevelt's status as a government agent, it was immunized against all liability for even its own personal faults. The Court emphatically rejected this view. The Court expressly recognized that the special operating agreement made Roosevelt operator or owner *pro hac vice* of the vessel. The opinion said, "S. S. *Unicoi* was a vessel owned by the United States Maritime Commission and *operated for it by respondent.*" (317 U. S. at p. 576.) "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent nonsuable for their torts" (p. 577).

The question thus posed the Court answered with an emphatic negative. "The liability of an agent for his own negligence has long been imbedded in the law * * * the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities" (p. 580). "But it is a *non sequitur* to say that because the [Suits in Admiralty] Act * * * restricts the remedies against the United States and its wholly owned corporations, it must be presumed to have abolished all right to proceed against all other parties" (p. 582). "The question is not whether the Commission had authority to delegate to respondent responsibilities for managing

and operating the vessel as its agent. It is whether respondent can escape liability for a negligent exercise of that delegated power if we assume that by contract it will be exonerated or indemnified for any damages it must pay" (pp. 583–584). "We hold that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for damages for his maritime tort. Whether a cause of action against respondent has been established is, of course, a different question" (pp. 584–585).

And so in the case at bar the circumstance that there is no impediment to plaintiff-appellants maintaining these suits against defendant-appellees does not establish that they have a right of recovery. But instead we are presented with the "different question" of whether plaintiff-appellants have a cause of action and can establish that defendant-appellees, rather than the United States, are the operators or owners *pro hac vice* of the vessels so as to be liable for negligence of the master and crew. We submit that we have shown that plaintiff-appellants have no such causes of action and must fail in these suits.

Nor is there any indication in *Hust* v. *Moore-McCormack* (1946), 328 U. S. 707, that the agent was to be held liable for those who were not its agents and servants because it was not operating the vessel. *Hust* only establishes that seamen have the right to Jones Act remedies against the agents who "procure" them for engagement by the masters of government vessels. It does not establish any right to recover either damages under the Jones Act or wages, maintenance, and cure under the general mari-

time law from one who is not found to be operating the ship.

Hust's case arose under the standard form agency agreement GAA 4–4–42 here involved. But it came to the Court on a record in which it had been expressly admitted by Moore-McCormack's answer to the complaint that Moore-McCormack were *operators* of the vessel.[8] It would seem that the four-judge majority opinion of Justice Rutledge accepted this admission as controlling, for without any consideration of the evidence on the point the opinion consistently refers to the agent as the *operator* of the vessel (228 U. S. at 717, 718, 720, 721, 724, 727, 730, 732). These four judges, who later dissented when the other five held in *Caldarola* that the agent is not the operator, in *Hust* held that in the circumstances shown by that record a seaman procured by such a general agent for service as a member of the crew of such a vessel may sue the agent as his employer within the technical meaning of the Jones Act.

The four-judge majority did not decide whether in the circumstances the master and crew of the vessel were so subject to the control of the agent that the latter was responsible for their acts under the rule of *respondeat superior* or otherwise and indeed the implication is that the agent is not (see 328 U. S. at 724). To do so, it would have been

[8] U. S. Sup. Ct., Oct. Term 1945, No. 625, R6, Paragraph I: "Admits that at the time of the accident alleged it was operating the Liberty Ship S. S. *Mark Hanna* for and on behalf of the United States of America, represented by the War Shipping Administration under a written agency agreement prescribing and limiting the duties, authority and functions of this defendant."

necessary for the four to overrule *Denton* v. *Yazoo Railroad*. However, in line with the admission of the answer the majority opinion of Justice Rutledge, concurred in by Justice Murphy, throughout called Moore-McCormack an "operating agent" and stated the facts as if it were a case of the negligent failure of Moore-McCormack to supply the seamen a safe place to work: "The electric bulb lighting the locker room had burned out and the room was dark. While crossing it to get the line, Hust fell through an unguarded hatch about twelve feet to the third deck" (328 U. S. at 712). While it is not clear in what the Court thought the negligence to consist, there was, of course, no need to specify if Moore-McCormack was "operating agent" and therefore *operator* of the vessel. (Compare other cases where concessions in the record that the agent was operating the vessel were treated as establishing liability of the agent as operating owner are *Carrol* v. *United States* (2d Cir., 1943), 133 F. 2d 690; *U. S. Fleet Corp.* v. *Greenwald* (2d Cir., 1927), 16 F. 2d 948, 951. Contrast where no such concession was made and proof to the contrary was proffered, *Roberts* v. *U. S. Fleet Corp.*, 240 N. Y. 474, 477, 148 N. E. 650, 651.)

Thus the Rutledge opinion announced, "Specifically, in this case the question is whether petitioner Hust retained the seaman's usual right to jury trial in a suit against the respondent, pursuant to the provisions of the Jones Act, for personal injuries incurred in the course of his employment as a seaman on the S. S. "Mark Hanna" (328 U. S. at 711). "The Supreme Court of Oregon considered that the

controlling question was whether Hust was respondent's employee when the injuries were incurred; and that 'it must be assumed * * * that the case is governed by the rule of the common law' to determine this question and thus the outcome of the case" (p. 713). "Hence, applying the common law 'control' test, the court came to its conclusion that Hust was not respondent's employee as that relation is contemplated in the ones Act" (p. 714).

This view the Rutledge opinion rejected so far as regards the definition of who are employees entitled to bring suit under the Jones Act. With the emphasis supplied by us to the significant words, the opinion said, "We may accept the Oregon court's conclusion that technically the agreement made Hust an employee of the United States *for purposes of ultimate control* in the performance of his work" (p. 723). "But it does not follow from the fact that Hust was technically the Government's employee that he lost *all remedies* against the operating 'agent' for such injuries as he incurred" (p. 724). "It is true these [tests] are applied in the normal everyday applications of the Jones Act. But in those situations this is done to determine who comes within, who without, the covered class in the Act's normal operation, not to exclude that class entirely or in large part" (pp. 724–725). "The mere fact that the terms of the standard agreement[9] were changed to omit the

[9] Justice Rutledge was in error in regarding the special interim *operating agreement* involved in the *Brady* case as a standard form. As pointed out in the letter from the General Counsel, U. S. Maritime Commission, *infra*, Appendix, p. A–6, that exceptional agreement was in effect with only four companies.

provision for manning the ship and substitute the provisions relating to employees contained in the general service agreement was not, in these circumstances, enough to deprive seamen *of that remedy"* (pp. 730–731).

For reasons not susceptible of precise analysis the Rutledge opinion concluded that suit under the Jones Act was available to plaintiff and the cause was remanded for further proceedings (328 U. S. at 734), but settlement was subsequently authorized by the United States without further procedings being had with respect to the question of *liability* as opposed to *suability.* Two of the four majority judges (Douglas and Black, JJ.) filed a separate concurring opinion expressing the view that although there was no demise the "private operator" had possession and sufficient control to be deemed owner *pro hac vice* (328 U. S. at 735, 736, 738). The three dissenting judges (Reed, Frankfurter, and Burton, JJ.) rejected this extension of the Jones Act and also denied that the agent was owner *pro hac vice* in possession and control (328 U. S. at 738). In *Caldarola* v. *Eckert,* (1947) 332 U. S. 155, this minority of three, with the addition of Vinson, C. J., and Jackson, J., became a majority of five and formally rejected the view that the agent was owner *pro hac vice* or operator of the Government's vessels. The law is now established to that effect which accords with the law maritime as understood prior to *Hust.*

We submit, therefore, that nowhere in *Hust,* any more than in *Brady,* can any basis be found for concluding that when sued under the rule of those cases,

the agent can be held liable for the negligence of the master and crew of a vessel of which not the agent but the United States was operating owner in possession and control.

III

The Clarification Act does not operate to make Deconhil liable for the negligence of the master and crew of the *Mesa Verde*

1. *The purpose of the Clarification Act was solely to give War Shipping Administration seamen the benefits of the Jones and Social Security Acts instead of the United States Employees' Compensation and Civil Service Retirement Acts.*—Neither the legislative history nor the language of the War Shipping Administration (Clarification) Act of March 24, 1943 (50 Appx. U. S. C. 1291), contains the slightest suggestion that Congress intended to impose liability upon the Government's shoreside agents for acts of other agents and servants of the United States engaged in the navigation and management of its vessels.

Never in the course of the extended preparatory work from which the Clarification Act resulted was there the slightest suggestion that a right to recover from the Government's agents for the acts of the master and members of the crew of the vessels operated by the Government was thought to exist or was intended to be given. The sole purpose and effect of the Act was to alter the rights of WSA seamen vis-a-vis the United States. The civilian seamen employed by the War Shipping Administration during the wartime expansion were not career employees of the Government like most of those of the Army Transport Service. Many WSA seamen already had accounts

under the Social Security Act, but during their government service they would be deprived of their benefit. It was even likely that their Social Security accounts might lapse because they were for too long a time engaged in the "noncovered" employment of government service. Moreover, their right to sue the United States under the Jones Act as their employer would be seriously limited by the Government's position that their remedy under the U. S. Employees' Compensation Act as government employees is exclusive and bars recovery from the United States in any type of suit. See *Posey* v. *T. V. A.* (5th Cir., 1937), 93 F. (2d) 726; *O'Neal* v. *United States* (E. D. N. Y., 1925), 11 F. (2d) 869, aff'd *ibid.*, 11 F. (2d) 871. Besides, whenever the government vessel was employed exclusively as a public vessel and not as a merchant vessel, jurisdiction for a Jones Act suit was not available under the Suits in Admiralty Act but had to be found under the Public Vessels Act. Yet, until recently there was serious question as to whether suits for personal injuries and death or for maintenance, cure, and wages could be brought under the Public Vessels Act at all. See *American Stevedores* v. *Porello* (1947), 330 U. S. 446, 453, 458; *United States* v. *Loyola* (9th Cir., 1947), 161 F. (2d) 126; *Jentry* v. *United States* (S. D. Calif., 1947), 73 F. Supp. 899, 902.

To remedy these difficulties in the exercise of their Jones Act remedy against the United States which it was feared might deter civilian seamen from shipping on WSA vessels, the War Shipping Administration took action. A bill, H. R. 7424, 77th Cong., 2d Sess.,

which eventually became the Clarification Act, was introduced and hearings were held by the House Merchant Marine and Fisheries Committee on September 2, 1942. These proceedings show conclusively that no right to sue the Government's agents was intended to be conferred by the Clarification Act. At the hearings a written report was received from Admiral E. S. Land, War Shipping Administrator, which stated in part (p. 8):

> Section 1 of the bill provides that seamen employed by or on behalf of the War Shipping Administration would have those rights, benefits, and immunities to which they would be entitled if employed on privately owned and operated vessels, and that they would not, by virtue of their status as Federal employees, become entitled to the benefits generally provided for such employees. The benefits to private seamen would include rights with respect to claims for death, injuries, illness, loss of effects, detention, and repatriation, and wages, maintenance, and cure, and old-age pension benefits. The claims would be enforceable by suit against the United States only under the Suits in Admiralty Act. This section would expressly exclude any benefits under the United States Employees' Compensation Act or the Civil Service Retirement Act.

Testifying orally at the hearing before the Committee, Admiral Land explained in greater detail (p. 14):

> As private employees, seamen are entitled to the protection of the old-age benefit provision of the Social Security system; they and their dependents may recover damages for injury or

death of seamen through the provisions of the Jones Act, they are protected by other remedies and they have certain rights with respect to allocation of wages. When the same seamen work on vessels which are bareboated or owned by the War Shipping Administration they become Government employees and these rights, which union labor has learned to prize very highly, either cease to exist or are substantially impaired. In exchange for such lost privileges, these seamen acquire special privileges of Government employees such as right to compensation for injury under the United States Compensation Act, a questionable right to retirement benefits and other rights peculiar to Government employees.

* * * it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters. This also seems to be the desire of the interested Government agencies as well as the labor unions representing seagoing personnel, and should have the effect of helping to maintain that high morale amongst the personnel which is essential for the effective discharge of their arduous duties.

Section 1 of the proposed bill would solve all these difficulties by providing that seamen employed by or on behalf of the War Shipping Administration shall have the rights, benefits, and immunities to which they would be entitled if employed on privately owned and operated vessels with respect to death and injury claims, social-security benefits, allotments, and other

matters covered by this section. Such claims would be enforceable by suits against the United States under the Suits in Admiralty Act and the War Shipping Administration would be authorized to make payments under the social-security program to the same extent as a private employer of seamen.

Samuel J. Hogan, President, National Marine Engineers Beneficial Association, explaining the views of one of the seamen's unions, testified (p. 27):

> Because of the exigencies of the war program, certain changes have taken place and we find ourselves in the anomalous position of losing social-security benefits while engaged in an active war for greater security.
>
> With the beginning of the national emergency, the Army Transport Service took over many of the merchant marine ships and at the same time discontinued social-security payments on the theory that the crew had become Government employees, and were hence exempted from the provisions of the act. Then the War Shipping Administration increased the number of ships which it was operating, and the picture became even more confused.
>
> Under the War Shipping Administration, ships are operated on two bases, the time charter and the bareboat charter. Under the time charter, social-security payments are continued as heretofore because the War Shipping Administration pays the agent; but in the case of the bareboat charter, no social-security deductions are made again on the theory that seamen on these ships are employees of the

> Government, and technically, not covered by the benefits of the act. The unfairness and confusion this creates is readily apparent. Seamen transfer from one boat to another. On one ship they may be allowed to make social-security payments; on the next voyage, they may not. The whole purpose of the social-security program—giving these men some security for the future—is thus completely nullified. Obviously, the fact that these boats are operating under varying financial arrangements between the War Shipping Administration and the operators, is not a valid reason for denying to these men benefits given to them under the Social Security Act.

It is clear that there was no intention to grant a new right to recover from the agent for liabilities otherwise resting exclusively upon the United States—which would, of course, have entailed the right to jury trial in the state or federal courts. Nor was there any belief that recovery might be had against the agent for the faults of the master and crew. A serious point was made of the fact that jury trial would not be permitted against the United States by the proposed act. A matter which would have been of no consequence if recovery might be had from the Government's agents. A statement submitted by William L. Standard in behalf of the National Maritime Union, made the following argument (p. 31):

> * * * If, therefore, H. R. 7424, in excluding merchant seamen from the benefits of the United States Employees' Compensation Act, afforded to merchant seamen employed on Government vessels, exactly the same rights now

enjoyed by them as employees of privately owned vessels, the unions would naturally have no opposition to the adoption of such a bill.

Unfortunately, section 1 of H. R. 7424, at line 6, page 2, provides the following:

"Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the suits in Admiralty Act, not withstanding the vessel on which the seaman is employed, is not a merchant vessel within the meaning of such act."

In requiring merchant seamen to present their claims under the suits in admiralty act, a definite limitation is imposed upon the exercise of their rights.

Under the suits in Admiralty Act, while it is true that merchant seamen enjoy the benefits of the Jones Act, and their rights are adjudicated pursuant to that act, the trial takes place before a Federal judge without the benefit of a jury trial.

The suits in admiralty act was adopted in 1920. Until the United States Supreme Court rendered its decision in 1930, in the cases of *Johnson* v. *United States, United States* v. *Lustgarten, Federal Sugar Refining Co.* v. *United States,* and *Royal Insurance Co.* v. *United States,* reported in 53 Supreme Court Reporter, at page 118 (280 U. S. 320), seamen had been permitted to prosecute their claims against the Shipping Board on the common-law side of the court with the benefit of a trial by jury. The Supreme Court in the *Johnson* case, based its decision on the presumed "intention of Congress to furnish the exclusive remedy in ad-

miralty against the United States and the corporations on all maritime actions arising out of possession or operation of merchant vessels."

The N. M. U., therefore, recommends that, in order that merchant seamen employed by the War Shipping Administration should not be deprived of a trial by jury, after the word "Act," at line 11, page 2, of the bill, the following be inserted:

"Provided, however, That the claimant may, at his election, maintain an action for damages at law, with the right of a trial by jury, and in such action the claimant may enjoy the same rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated vessels."

Attorney General Biddle submitted a reply on behalf of the Government explaining why jury trial was not compatible with the interest of the United States. He stated in part (p. 33):

> I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account in reaching your conclusion on the issue of policy involved.
>
> * * * * *
>
> (2) It has been found necessary in protecting the security of the Nation to adopt an amendment to admiralty rule 46. It has been found that in the course of admiralty litigation information is made available to the enemy detrimental to the national safety and detrimental to the lives and welfare of seamen. The

amendment to admiralty rule 46 contemplates careful surveillance of admiralty litigation and control of the proceedings to prevent leakage of information that might be of value to the enemy and of danger to the United States. The scheme of this protection is that every libel is submitted to me; and my assistants, in collaboration with appropriate officers of the Navy, examine the litigation. If the Navy Department is of the view that information stated in the pleadings or liable to be developed in the course of the trial would be of value to the enemy, admiralty rule 46 authorizes the court to impound the pleadings, to hold the trial in camera and to impound all records in the proceedings. It is possible for this to be effective if the matter is heard by a judge. It is much more difficult for it to be effective if it is tried before a jury, and, of course, the rule will not apply if the action is at law. Obviously in trial of cases on claims asserted by seamen because of death, injury, illness, loss of effects, detention, or repatriation, disclosures regarding formation and operations of convoys, routes, protection for shipping, etc., might well be made in the course of trial.

* * * * *

(4) It is further to be noted that these cases will have to be tried largely on depositions. Judges are better qualified by experience than juries to appraise the value of evidence presented in the form of depositions.

That the Congress thoroughly understood that agents were not liable and that the purpose of the Clarification Act was not to authorize suit against

the Government's agents for negligence of the master and crew with the consequent jury trial in the state and federal courts which it had decided to avoid, is further shown by House Report No. 2572, 77th Cong., 2d Sess., where it is said of the War Shipping Administration seamen (p. 9):

> * * * If they were private employees, rights to redress for death, injury, or illness could be prosecuted under the Jones Act and the general maritime law. These same rights may be asserted against the United States as the employer under the Suits in Admiralty Act providing the vessel involved is a merchant vessel. In case of public vessels the seaman must rely upon the Administrator's policy for compensation recognizing contractual liability which this legislation recognizes. Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel. As a consequence the afore-mentioned rights of such seamen are frequently in doubt, In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration.

The point is made equally plain in Senate Report No. 1655, 77th Cong., 2d Sess., where it is stated (pp. 3-4):

> The substantive rights under statute and general maritime law with respect to death, injury, illness, or other casualty to seamen employed by the War Shipping Administration would under section 1 be controlled by existing law relating to privately employed seamen. The only modification thereof is that the rights shall be enforced in accordance with the provision of the Suits in Admiralty Act. Other claims, such as claims for maintenance and care, collection of wages and bonuses, and making of allotments, would also be enforced under that act. With respect to the benefits administered by the Public Health Service and the Social Security Board, section 1 provides that claims therefore shall be enforced only in accordance with existing applicable law. This is proper inasmuch as these benefits are administered by Government agencies.
>
> * * * * *
>
> Inasmuch as seamen covered by section 1 will be entitled to the rights provided under the Jones Act and general maritime law and to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act. This eliminates the danger that seamen might recover both against the Federal employees' compensation fund and under statutory or common law remedies for the same injury.

And to the same effect, see Senate Report No. 1813, 77th Cong., 2d Sess., pp. 5–6.

With the close of 1942 the Seventy-seventh Congress ended and H. R. 7424 died. With amendments it was reintroduced as H. R. 133, 78th Cong., 1st Sess. Despite the *Brady* case, decided January 18, 1942, no change was made in the bill to make the government's agents liable. Indeed, its purpose was again explained on February 8, 1943, in House Report No. 107, 78th Cong., 1st Sess. (pp. 2–3):

> The effect of section 1 is to provide that officers and crew members who are employed on behalf of the United States through the War Shipping Administration shall be put on the same basis as seamen in private employment with respect to rights, benefits, and privileges in connection with employment, particularly in case of death, injury, or other casualty. Under the bill, these employees of the War Shipping Administration will have the seaman's right to wages, maintenance, and cure, in case of illness or injury in the ship's service. They will have the benefits of the Public Health Service, including marine hospitals, like other seamen. They will have old-age and survivors' insurance under the Social Security Act. They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to

> enforce claims for these benefits according to the procedure of the Suits in Admiralty Act except that claims with respect to social-security benefits shall be prosecuted in accordance with the procedure provided in the social-security law. * * *
>
> * * * * *
>
> The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure. This should follow even in the extraordinary case where vessels might otherwise technically be classed as public vessels.

See also additional extracts printed in 1943 A. M. C. 606–637. And see pertinent parts of Senate Report No. 62, 78th Cong., 1st Sess.

2. *The actual terms of the Clarification Act do not authorize suit against the Government's agents or alter their liability in tort or contract.*—Not a word in the text of the act gives the slightest suggestion to that effect. The bill became law on March 24, 1943, and was printed with explanatory headings in 1943 A. M. C. 594. Because, when thus printed, it clearly shows that the text of the act, like its legislative history, is totally devoid of any suggestion of authority to sue the Government's agents, we here

reproduce Section 1 (a), the only pertinent part, with the headings inserted by the editors of American Maritime Cases—

RIGHTS OF MERCHANT SEAMEN EMPLOYED BY THE U. S. THROUGH THE W. S. A.

SEC. 1. That (a) officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign-flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or reparation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

NO RIGHTS UNDER CERTAIN FEDERAL EMPLOYMENT STATUTES

Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act

entitled "An Act to provide benefits for the injury, disability, death, or detention, of employees of contractors with the United States and certain other persons or reimbursement therefor," approved December 2, 1942 (Public Law 784, Seventy-seventh Congress).

PUBLIC HEALTH AND SOCIAL SECURITY CLAIMS

Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seamen were employed on a privately owned and operated American vessel.

DEATH, INJURY, MAINTENANCE, WAGE, ETC., CLAIMS (SUITS IN ADMIRALTY ACT 1920 EXTENDED)

Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act.

RETROACTIVE EFFECT TO OCTOBER 1, 1941

Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations

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prescribed by the Administrator, War Shipping Administration.

SOCIAL SECURITY RIGHTS

Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended.

DEFINITION—"ADMINISTRATIVELY DISALLOWED"—"W. S. A."—"SEAMAN"

When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

The language of the Act thus makes it absolutely clear that the Congress did not intend to grant new rights or impose new liabilities against the Government's agents or alter in the slightest any rights seamen might already have against them. The contemplation of Congress was that agents were to continue

to be liable for their own torts and contracts but not for those of the United States exactly as established by *Brady*. Nowhere, we submit, is there the slightest indication that the language of the Act by inadvertence had defeated the congressional purpose of withholding jury trial and had instead given War Shipping Administration seamen a right to recover by suit against the Government's agents at law in the state or federal courts. Neither is there any indication of an intent to restrict any rights the seamen might have against the Government's agents for their own torts by virtue of the rules laid down in the *Brady* case.

It is clear that the sole intended effect of the Clarification Act was to remove all impediments to War Shipping Administration seamen's asserting their rights against the United States under the Jones Act and preserving their rights under the Social Security Acts. In return the Act discontinued their rights under the U. S. Employees' Compensation and Civil Service Retirement Acts, saving, however, such claims and clauses of action as had theretofore accrued under those acts. We submit, therefore, that the Clarification Act has no bearing on the present case.

CONCLUSION

Appellant Watson is deprived of no substantial right by being required to vindicate his claims by suit against the United States, the operating owner of his vessel, rather than against the agent appointed by the Government to manage and conduct the accounting and certain other shoreside business operations of the

vessel. The problem presented by this case has been given exceedingly careful consideration by the Supreme Court in *Caldarola* v. *Eckert,* by this Court in *Lubinski* v. *Alaska S. S. Co.* and by the Second Circuit in *Shilman* v. *United States* and we respectfully submit that those decisions should be followed and this Court should order the dismissal of appellant Watson's suit.

H. G. Morison,
Assistant Attorney General,
Leavenworth Colby,
Keith R. Ferguson,
Special Assistants to the Attorney General,
Admiralty and Shipping Section,
Department of Justice.

April 1948.

APPENDIX A

Statutes and Regulations Involved

1. The Jones Act of June 5, 1920, c. 250, s. 33, 41 Stat. 1007 (46 U. S. C. 688), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *

2. The Employers' Liability Act of April 22, 1908, c. 149 s. 1, 35 Stat. 1404 (45 U. S. C. 51), provides in pertinent part:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its * * * boats, wharves, or other equipment.

3. Revised Statute 1753 (5 U. S. C. 631), authorizing the President to prescribe regulations regarding civil service employment, provides:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their du-

ties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

4. The Civil Service Rules and Schedules, as codified in Title 5, Code of Federal Regulations (1943 Cum. Supp. pp. 1441, 1488), provide in pertinent part as follows:

CIVIL SERVICE RULE II

SECTION 2.1 *Extent of the classified service.*—The classified service shall include all persons who have been heretofore or may hereafter be given a competitive status in the classified civil service with or without competitive examination, by legislative enactment, or under the civil service rules promulgated by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of indivduals to positions within such service. It shall include all positions now existing or hereafter created by legislative or Executive action, of whatever function or designation, whether compensated by a fixed salary or otherwise, unless excepted from classification by specific affirmative legislative or Executive action. No right of classification shall accrue to persons whose appointment or assignment to classified duties is in violation of the civil service rules. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939; 3 F. R. 1519.]

SECTION 2.3. *Exceptions from classification.*—(a) Positions in Parts 50 and 51 are excepted from the classified service.

(b) Appointments to the excepted positions named in Part 50 may be made without examination or upon noncompetitive examination. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939, as amended by E. O. 8083, Apr. 10, 1939, effective May 1, 1939; 3 F. R. 1519, 4 F. R. 1577.]

* * * * *

SECTION 50.0. *Certain positions excepted from examination under § 2.3.*—The positions designated in this

part are excepted from examination, but not more than one position shall be treated as excepted under any title unless a different number of positions be indicated (Rule XVI, sec. 1, E. O. 209, Mar. 20, 1903, 5 C. F. R. 16.1) [Regs. CSC, as of June 1, 1938].

* * * * *

§ 50.21. *United States Maritime Commission.*—(a) All positions on Government-owned ships operated by the United States Maritime Commission [E. O. 9004, Dec. 30, 1941; 7 F. R. 2].

NOTE: These positions were transferred to the War Shipping Administration by E. O. 9054; 7 F. R. 837.

APPENDIX B

THE LETTER OF THE GENERAL COUNSEL, UNITED STATES MARITIME COMMISSION, IN REPLY TO THE ENQUIRIES OF THE SUPREME COURT OF THE UNITED STATES

UNITED STATES MARITIME COMMISSION,
Washington, April 28, 1947.

Honorable JOHN F. SONNETT,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

SIR: This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc., et al.,* that the Maritime Commission as successor to the United States Shipping Board and the War Shipping Administration, supply additional information for the use of the Supreme Court. It appears that you desire to be informed why the War Shipping Administration, instead of entering into managing-operator agreements, such as had been used by the Shipping Board and the Maritime Commission from the close of wartime government operation in 1920 until the final sale of the Government's merchant fleet in 1940, decided to adopt service agreements whereby it employed existing steamship companies as its agents to conduct the business of the vessels. You also request an explanation of the differences between the standard form service agreement GAA 4–4–42 adopted by the War Shipping Administration and the former managing-operator agreements, together with a statement as to the manner in which the vessels were operated and serviced under the various integrated contracts of the War Shipping Administration.

CONGRESS AUTHORIZED DIRECT GOVERNMENT OPERATION

It must be understood at the outset that direct government operation of the government merchant fleet was believed indispensable to the war effort in both World Wars. It was ac-

cordingly specifically authorized by the Congress and the arrangements which were made for direct government operation with the assistance of experienced steamship companies as ships' husbands for the servicing of the vessels and as berth agents for the handling of port services arising out of their operations on the various routes were deliberately chosen from that point of view. As is evident from a comparison of the new standard form agreements, this type of operation constituted a significant change from the method of operating government vessels which had been in force from January 1920 until the sale of the last of the government lines in May 1940, and marked a return to the direct government operation of World War I.

The effect of the old peacetime operation, particularly subsequent to 1929, is best summarized by the Shipping Board in its Annual Report for 1929. There, in explaining the purpose of the operating agreement which it had adopted, the Board stated (p. 95):

> By this plan, the operator assumes complete physical and financial control of the operations of the line, and the Merchant Fleet Corporation confines its activities to periodic inspections covering the maintenance of service in accordance with the contract and the physical condition of the ships. For the services of the operator in maintaining the line, a lump-sum amount is paid, the amount to be determined for each line by analysis of recent operating results. This form of agreement places the managing operator upon as nearly a privately owned operating basis as is practical and should pave the way for the eventual sale of the lines.

This referred to what was ultimately known as the "Lump Sum Operating Agreement, 1930" which was considered in the reports of the Black Committee (S. Rep. 898, 74th Cong., 1st Sess.) and the Comptroller General (H. Doc. 217, 72d Cong., 1st Sess.). Its text is printed in full in Smith and Betters, U. S. Shipping Board, its history, activities, and organization, pp. 293–302. Earlier forms are printed in S. Doc. 38, 67th Cong., 1st Sess., pp. 60–65.

The normal peacetime scheme of operation which, following the Black report, Congress directed in the Merchant Marine Act, 1936, required the Commission to arrange for the charter of the government-owned merchant fleet by private steamship companies. Section 704 (46 U. S. C. 1194) provided:

> All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act. All vessels transferred to the Commission by this Act and now being operated by private operators on lines in foreign commerce of the United States shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided, preference to be given to present operators, and all operations of the Commission's operation by private operators shall be under such operating agreements discontinued within one year after the passage of this Act.

But in order to assure operation of lines which the Commission might deem essential, but for which it might be impossible to find private operators willing to assume the financial risk of operation under bareboat charter, Congress provided in Section 707, as amended (46 U. S. C. 1197), that the Commission itself might operate such lines through private operators under such operating agreements as the Commission might find advantageous. It was under exceptional arrangements of the character that the special operating agreements with the Roosevelt, Southgate-Nelson and two other operating companies were continued by the Commission until final sale of the government lines in 1940. And it was these special agreements which were involved in the cases of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate-Nelson Co.*, 121 F. 2d 190, cert. den. 314 U. S. 682. The text of the special Roose-

velt agreement is printed in full in the Brady record October Term 1942, No. 269, pp. 21–32.

In order to meet potential war conditions, Congress, by the Act of August 7, 1939, c. 555, 53 Stat. 1255 (46 U. S. C. 1242 (e)), amended the Merchant Marine Act and conferred special powers upon the Commission with respect to vessels requisitioned or purchased in case of national emergency. In particular Congress authorized the Commission "to repair, recondition, reconstruct, *and operate*, or charter for operation, any vessels acquired" under such authority. By Section 4 of the Act of June 6, 1941, c. 174, 55 Stat. 244 (50 Appx. U. S. C. 1274), Congress further recognized the developing national emergency and expressly directed that any vessels acquired or made available to the Commission might be "operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest, giving primary consideraton to the needs of national defense." Finally, following the outbreak of hostilities, President Roosevelt by Executive Order 9054 of February 7, 1942 (3 C. F. R. 1943 Cum. Supp. 1086), issued pursuant to the First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838 (50 Appx. U. S. C. 601), established the War Shipping Administration under the direction of an Administrator, Paragraph 2 of that order directed the Administrator to control the "operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States" with the exception of vessels under the control of the military or naval authorities. By paragraph 3 it also transferred to the Administrator all duties and authority with respect to the operation of vessels which had previously been conferred by law upon the Maritime Commission.

PURPOSE OF DIRECT GOVERNMENT OPERATION

The mandate for wartime operation thus granted the War Shipping Administration was entirely different from the peacetime functions of the Shipping Board and the Maritime Commission as directed by earlier legislation culminating in the Merchant Marine Act, 1936, and carried out by means of the operating agreement employed from 1920 to 1940. On the contrary, the type of operation authorized was analogous to the

direct government operation followed during World War I by the Shipping Control Committee of the Shipping Board with the aid of the Division of Operations of the Fleet Corporation. Then President Wilson, by Executive Order 2664 of July 11, 1917, issued pursuant to the emergency provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, had conferred similar authority upon the Shipping Board to assume "the operation, management, and disposition" of all vessels acquired by the United States. The Board, in its turn, by resolution of February 11, 1918 (H. Rept. 1399, 66th Cong., 3d Sess., p. 32), had created the Shipping Control Committee "empowered to manage, control, distribute, and allocate all tonnage now subject or which hereafter may become subject to the control of the United States Shipping Board by ownership, charter, or otherwise." And the direct governmental wartime operation that followed is now history (see Crowell and Wilson, *Road to France,* pp. 377–378; Smith and Betters, *U. S. Shipping Board, its history, activities, and organizations,* pp. 24–25, 29–30).

It should be common knowledge that the basic reason for the War Shipping Administration following a plan of operations whereby it manned and navigated the Government's vessels was the conviction that it was essential to the conduct of the war to make the navigation and physical management of the vessels afloat an exclusively government operation. But equally it was desirable to take advantage of the existing contracts and experienced personnel of steamship companies for servicing the shoreside needs and administrative affairs of the vessels and obtain the benefit of their existing agreements with the maritime unions for procuring masters and crews. From a review of the War Shipping Administration files it would seem that the following points were deemed particularly essential:

1. Insure immunity from foreign and local inspection, regulation, and taxation for the vessels and their operation.

2. Retain direct control of the routing, navigation, and physical management of the vessels and of their masters and crews but not necessarily of their procurement for employment.

3. Provide a mechanism for direct control of fueling, supply-

ing, repairing, and similar services, and for immunity from foreign and local regulation and taxation of such activities.

These points could be best attained only by direct government operation. Operation of the vessels by independent contractors would not fulfill the requirements.

When War Shipping Administration assumed this task of operating the Government's merchant fleet, the then existing scheme of the government was to bareboat charter vessels to private operators. The onset of war led to a general program of requisition and to acquisition of a vast number of vessels of all types through purchases and the stepping up of our construction program. The problem presented under these new conditions was how to carry out the mandate granted by Executive Order 9054 "to control the operation * * * and use of all ocean vessels" as a coordinated major governmental program while at the same time taking advantage of the existing organizations in the various ports which the steamship lines had created. Efficient wartime operation required speed and secrecy. It was indispensable to escape the detailed inspections, reports and accounting which foreign, and to some extent local, governments impose on private-vessel operation in aid of their police, regulation and taxation powers. Only direct government operation would support the claim of sovereign immunity and permit escape from such delays and publicity. But efficient operation just as obviously dictated a policy of full utilization of the technical skill and facilities of shipping organizations, which had been painstakingly encouraged by the Commission's aid over a long period of years, precisely in order that they might be utilized by the public in just this type of emergency. Such organizations, developed in peacetime by private shipping companies, consist of highly skilled personnel trained to work smoothly and closely together. Their technical personnel have complete familiarity with the terminals, connecting carriers, loading and unloading conditions, as affected by port, seat and weather conditions, and with all other problems inherent in overseas transport in the various trades. They are familiar as a team with the various techniques and skills of such shoreside matters as towage, wharfage and stevedoring practices, maintenance and voyage repairs and countless

other minor port operating details which, unless efficiently handled, result in substantial loss of time, money and ship space. Such organizations also have access to a supply of ship and shore personnel as a result of their union agreements and other connections. It was obvious that the only workable solution was a twofold division of duties: the navigation and physical management of the vessels afloat was to be carried out by shipmasters acting directly as agents or employees of the United States and in exclusive control of their vessels and crew; the port services, the husbanding of the vessels and the details of shoreside administration were to be carried out by existing shipping companies acting not as independent contractors but solely as agents for the United States.

The nature of such agency arrangements was especially important in connection with foreign taxation and regulation. For example, not even an act of Congress might have been sufficient to preserve immunity of the vessels if the general agents were made independent contractors and placed in possession of the vessels. Cf. *Mexico* v. *Hoffman*, 324 U. S. 30, 37. As Admiral Land stated in a circular instruction of June 10, 1942, addressed to all agents and general agents with respect to tax immunity:

> When the forms of Service Agreements (GAA and TCA) were drafted, and later when they were approved by me for use as standard forms, it was contemplated that Agents and General Agents who executed them would act as agents for the United States, and not as independent contractors, in conducting the business of the vessels allocated to them (see Articles 1 and 2). It was also contemplated that, since the agents were authorized to make purchases necessary to the maintenance, management, and operation or conduct of the business of the vessels, the purchases would be made in the name of the United States as principal, that title to the goods purchased would vest in the United States, and that the United States, and not the Agent, would be obligated to pay the purchase price and its credit would be pledged therefor.

See also previous circular instructions, dated May 19, 1942, by the Director of Fiscal Affairs.

Of all the various aspects covered by the discussions that attended the drafting of the service agreements necessary to carry out the plan for wartime operations, the question of whether the crews were to be employees of the United States or of the general agent received most particular attention. Aside from the propriety of a Government agency, as employer, negotiating directly with labor unions or entering into collective-bargaining agreements, the practical difficulties of so doing were almost insuperable due to the large number of labor organizations and the consequent variations as to wages, working conditions, and other matters which existed in the maritime industry as a result of a long history under private operation. It was recognized that, for at least the early years of the war, the requisitioned vessels would represent a vast majority of those under government control and the transition from private to direct government operation could be best achieved only by arrangements which provided for a minimum disturbance of existing collective-bargaining relationships. On the other hand, there was no doubt that as the general agents would not be owners nor bareboat charterers of the vessels they could not claim the benefit of the limitation of liability acts (46 U. S. C. 181 *et seq.*) as the law then stood. Compare Section 4 of the War Shipping Administration (Clarification) Act (50 Appx. U. S. C. 1924), extending the benefits of the acts. General agents, while willing to assist in procurement, were reluctant to accept the unlimited liability which would result from the masters and crews being their agents or employees. Moreover it was believed that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States. Finally, only if the masters and crews were government employees could the United States be certain of its right to invoke sovereign immunity aboard and to insist at home that all litigation involving the navigation and management of the vessel should be in the admiralty courts where necessary wartime secrecy could be preserved.

Ultimately a plan was developed similar to that stated in Section 79, comment a, of the Restatement of Agency. It was determined that the general agent, acting as agent for the

Government, should procure masters and crews to man the vessels. It was to be expressly provided that they should be procured pursuant to the applicable union agreements and in accordance with customary commercial practices. It would thus be possible to retain the advantage of existing union agreements without sacrificing the advantages arising out of the status of the masters and crews as government employees subject to the exclusive control of the United States.

1942 FORMS OF AGENCY AGREEMENTS

Pursuant to the plan thus evolved, the War Shipping Administrator adopted forms of service agreements whereby existing steamship companies were appointed general agents to husband vessels to be assigned to them and operators of eixsting steamship lines were appointed berth agents to handle the cargo activities and other port services required by vessels assigned to the routes established. These service agreements were promulgated by the Administrator in General Order No. 21 of September 22, 1942 (7 Fed. Reg. 7561), and its supplements. An examination of the texts of the two agreements and a consideration of the complementary functions which they assign to the general agent and berth agent in attending to the service of the vessel on shore shows conclusively that neither agent is in control of the vessel but that the United States alone, as the principal both of the vessel's master and of the general agent and berth agent has full control.

The general agency agreement, form GAA, 4–4–42, in effect at the time Caldarola was injured (printed in Document 4, Plaintiff's Exhibit 7, pp. 326–336), provided in pertinent part as follows:

> ARTICLE 1. The United States appoints the General Agent *as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned* to it by the United States from time to time.
>
> ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States,* in accordance with such directions, orders, or regulations as *the*

latter has prescribed, or from time to time may prescribe. * * *.

ARTICLE 3A. To the best of its ability, the General Agent shall *for the account of the United States:*

(a) Maintain the vessels in such trade or service *as the United States may direct;*

(b) Collect all moneys due the United States * * * and account to the United States for all moneys collected or disbursed * * *;

(c) Equip, victual, supply, and maintain the vessels, subject to such directions, orders * * * and inspection *as the United States may from time to time prescribe;*

(d) * * * The Master *shall be an agent and employee of the United States and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall procure and *make available to the Master for engagement by him* the officers and men required by him to fill the complement of the vessel * * * *The Officers and members of the crew shall be subject only to the orders of the Master.* All such persons shall be paid in the customary manner with *funds provided by the United States hereunder.*

t was contemplated by the berth agency agreement, form 3A 12–29–43, in effect at the time Caldarola was injured (*ibid.*, pp. 367–374), which provided in pertinent part as follows:

ARTICLE 1. The United States appoints the Berth Agent *as its agent and not as an independent contractor, to conduct the business of vessels* assigned to it by the United States from time to time.

ARTICLE 2. The Berth Agent accepts the appointment and undertakes and promises so *to conduct the business for the United States,* in accordance with such directions, orders, or regulations *as the United States has prescribed,* or from time to time may prescribe. * * *

ARTICLE 3A. Unless otherwise directed by the United

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States, the Berth Agent, in all cases, shall, to the best of its ability, for the account of the United States:

(a) Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the United States *as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels;* * * *

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States * * *;

(c) *Provide and pay for all fuel, fresh water, stevedoring and other cargo-handling expense, port charges, wharfage and dockage, pilotages, agencies, canal dues, commissions, and consular charges,* except those pertaining to the Master, officers, and crew, * * * Provided, That, where the United States has entered into agreements for any of the foregoing items (such as for stevedoring and supplying fuel), the Berth Agent shall see that the items are furnished pursuant to the provisions of such agreements and shall make the necessary arrangements with the District Manager, or other representative of the United States therefor;

(d) *Issue or cause to be issued to shippers customary freight contracts and bills of lading in the form prescribed by the United States,* and prepare manifests and other documents. Where appropriate, issue or cause to be issued to passengers customary passenger tickets in the form prescribed by the United States.

In view of the fact that as to some of the vessels the same person might act both as general agent and as berth agent and the fact that vessels at times would be in ports where it would be necessary for the berth agent to perform the duties of husbanding the vessel, a certain overlapping of duties and powers was necessarily provided for. However, none of these powers infringed upon the absolute control of the United States, through

the master over the navigation and physical management of the vessel. No conflicts could arise from this overlapping of duties between the general agent and the berth agent because they were avoided or resolved in practice by specific orders of their common principal, the United States. The clear line of authority vested in the master from the United States as contrasted with the overlapping duties of general agents and berth agents indicates clearly that the master was directly responsible to the United States and not to the general agent or berth agent.

DIFFERENCE FROM COST-PLUS CONTRACTOR AGREEMENT

Analysis of the differences between the general agency agreement, on the one hand, and the agreements which turned the vessels over to private contractors for operation, on the other, confirms that the control of the navigation and physical management of the Government's vessels, as distinct from services in attending to their business onshore, was in the United States and that the general agent no more than the berth agent was permitted to have any control over the navigation and physical management of the vessels. As typical of the latter group of contracts we may take that with the Roosevelt Steamship Company, which was before the court in the *Brady* case, and the "Lump Sum Operating Agreement, 1930," which was before the Black Committee in 1935. As indicated above, the texts of both are readily available to the Court.

Article 1 of the general agency agreement expressly states that the Government appoints the general agent "as its agent and not as an independent contractor," to "manage and conduct the business of the vessel." On the contrary, paragraph 1 of the Special Roosevelt agreement provides that the "managing agent" is appointed "to manage, *operate,* and conduct the business of the line"; and paragraph 3 states that the vessels are allocated "for management and *operation.*" The 1930 agreement employed a similar form and in addition to paragraph 14 provides that the "managing operator" shall "assume control" of "the management and operation of the vessels." Significantly, such provisions are carefully excluded from the general agency agreement.

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Article 3A (a) of the general agreement provides that the general agent shall maintain the vessels in such trade as the United States may direct. The Government is thus entirely free to issue and did issue detailed orders concerning routes, voyages, cargoes, rates of freight, and all similar matters. The special Roosevelt agreement, on the other hand, within the limitations of paragraphs 4 and 5, concerning the number of sailings on the precise trade routes specified and the necessity for contracting in the trade name of the line, leaves the entire operation to the contractor's discretion. Paragraph 5 of the 1930 agreement is similar in effect. Both leave the times and conditions of the sailings entirely to the discretion of the operator.

Article 3A (c) of the general agency agreement requires the general agent to "equip, victual, supply, and maintain the vessels" as directed by the United States and 3A (d) requires the general agent to procure the master and crew. But it is provided that, once procured, the master "shall be an *agent and employee of the United States* and shall have and exercise full control, responsibility, and authority with respect to the navigation and management of the vessel" and that "the officers and members of the crew shall be subject only to the orders of the master." Finally it directs that they shall be paid with funds provided by the United States. No corresponding language exists in the old agreements. Paragraph 7 of the Roosevelt agreement requires the managing agent to "*man*, equip, victual, supply, and *operate* the vessels." Paragraph 8 of the 1930 agreement provides, "The Managing Operator shall, *at his own expense, man, operate,* victual, *navigate,* fuel, and supply the vessels, and shall pay all port charges, pilotage, taxes, and all other costs and expenses. The only restriction upon the operator in the old forms is that the licensed officers and chief steward are to be subject to the Government's approval.

Article 8 of the general agency agreement states that the United States will provide insurance against all insurable risks including marine, war and protection and indemnity risks, "which insurance shall include the general agent and the vessel personnel as assureds." Paragraph 14 of the special Roosevelt agreement and paragraph 20 of the 1930 agreement, on the

other hand, required the Government to provide all marine insurance, but required the operator to provide all protection and indemnity and similar form of insurance which the Government may deem necessary. Protection and indemnity insurance covers the vessel's liability for personal injury to crew members and others and for damage to cargo. The function of providing it is ordinarily placed upon the party responsible for the navigation and management of the vessel. The retention in the United States, by the general agency agreement, of the function of providing protection and indemnity insurance is significant as showing that the navigation and physical management of the vessel is completely divorced from the functions of the general agent in husbanding the vessel and attending to its shoreside activities.

Article 14 of the general agency agreement provides that, unless otherwise instructed and "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States," the general agent shall "arrange for the repair of the vessels" and cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. Article 3A (c) imposes a general duty of maintenance. Paragraph 11 of the special Roosevelt agreement similarly requires the managing agent to "exercise reasonable care and diligence to maintain the vessel." But paragraph 12 of the Roosevelt agreement further provides that the Government shall have the right "to survey any of the vessels operated by the managing agent hereunder to satisfy itself that they are being properly maintained" and requires the managing agent "to give such representatives as the owner may designate from time to time full, free and complete access at all reasonable times to all parts of the vessels. Paragraph 9 of the 1930 agreement provides that "The Managing Operator shall, at its own expense * * * keep said vessels * * * in substantially the same condition as when delivered," and paragraph 5 reserves the right for the Government to survey the vessels at any time. Such provisions for access to the vessels, although essential in the earlier agreements when the United States was not in possession of the vessels, were obviously un-

necessary in the 1942 general agency agreement since the master "as agent and employee of the United States," exercising full control "with respect to the navigation and management of the vessel," would hold possession of the vessel for the United States and subject to its access at all times.

The financial arrangements for the vessels also tend to confirm that under the general agency agreement the vessels are in the exclusive control of the Government. The Lump Sum Operating Agreement, 1930, provides that the managing operator shall pay all expenses of operation and in paragraph 18 states that he "agrees to assume for his own account all losses incurred in the operation" and that any profits shall be his property. The Operator's compensation is fixed by paragraph 21 at a lump sum for each voyage. The Roosevelt agreement, on the other hand, provides in paragraphs 6, 7, and 19 for an ordinary cost-plus-fixed-fee type of operation. Article 7 of the general agency agreement, by contrast, not only requires the United States to reimburse the general agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," but, moreover, provides that the United States may advance moneys "to provide for disbursements hereunder in accordance with such regulations" as it shall prescribe. In fact, in accordance with the practice codified in Fiscal Regulation No. 6 (Revised), January 1, 1944, all expenses are paid directly from funds of the United States placed in special deposit accounts provided for in the forms found at pp. 386–394 of Document 4 (Plaintiff's Exhibit 7). As compensation, Article 5 of the general agency agreement allows "such fair and reasonable amount" as the Administrator shall from time to time determine. At the time Caldarola was injured compensation was fixed by War Shipping Administration General Order No. 34, December 31, 1943 (9 Fed. Reg. 1059). The basic amount totaled $80 per day per vessel for husbanding and accounting services. General agents and berth agents performing berth or port services are also compensated by certain amounts measured by the cargo and passengers loaded or unloaded. All compensation is subject to recapture or renegotiation to the extent found to be excessive Under both

the Roosevelt agreement and the general agency agreement the losses and profits of the operators fall upon the United States. The general agency agreement, however, differs in that the agent is no longer, as in the old forms, an independent contractor, "managing agent" or "managing operator." The general agent is restricted to being a ship's husband acting merely as an agent and under detailed government control.

OPERATION UNDER THE 1942 AGREEMENTS

It is obvious from the foregoing analysis that general agents and berth agents in the operation of War Shipping Administration vessels are mere agents limited to the performance of shore side or nonnavigating functions under general supervision and are not allowed the board discretion exercised by independent contractors in control or possession of the vessels. The general agency and berth agency agreements alike made every action of agents subject to "such directions, orders or regulations" as the Government should prescribe. And in fact the various activities of the agents were subjected to control through the medium of general orders, operations regulations, traffic regulations, fiscal regulations, legal bulletins, auditing and accounting instructions, insurance instructions and medical directives and through supervision by the War Shipping Administration with the aid of some 5,000 employees located in the principal ports, as well as at Washington. The discretion of agents is particularly circumscribed by three practices followed by the War Shipping Administration in operating the Government's merchant fleet: (1) The appointment of both general agents to render husbanding services and berth agents to render port services to the vessels, (2) the Government's execution of master contracts for the principal services and supplies needed for the vessels, and (3) the requirement of Article 3A (d) that the master be an agent of the United States and not of the general agent and the crew subject only to the orders of the master. Such practices are, of course, entirely foreign to operation by independent contractors, as well as to private peacetime operation, for in those the independent contractor or private operator enjoys unlimited discretion in the sources and methods of services and supply.

The restrictions resulting from the combined use of berth agents and general agents are many and War Shipping Administration operations bear little resemblance to peacetime operations. Succinctly stated, just as general agents are charged with the function of arranging for maintaining and supplying the vessels for the account of the United States, so berth agents are charged with the correlative function of arranging for the account of the United States the port services required at each end of the route. The general agent "husbands" the vessel, consisting principally of victualing, supplying, maintaining and repairing, while the berth agent performs "port services," consisting principally of arranging for the handling and loading of cargo. At foreign ports, moreover, the berth agent, in addition to the cargo services, arranges for all husbanding services required.

Berth agents were generally chosen for routes over which they had previously operated vessels during peacetime and had developed organizations familiar with the local problems peculiar to such routes and the conditions of loading and discharge at their ports. They were appointed on the basis of their special competence for handling special routes. General agents were appointed on the basis of their experience in husbanding vessels. Many companies acted both as general agents and as berth agents but their functions only coincided where vessels assigned to them as general agents were operated over routes assigned to them as berth agents. The delineation of the duties of general agents and berth agents is fully set forth in War Shipping Administration Operations Regulation No. 84,[1] but may be conveniently illustrated by an example. Thus assume that the A Steamship Company was designated general agent of the United States to husband a vessel, S. S. *Eks*. At the same time it was designated as berth agent of the United States for the New York to United Kingdom route over which it had been a peacetime operator. Thereafter the A Company would act as berth agent for any vessels, no matter what general agent might husband them, which operated on its route—both while the vessels were at New

[1] The text of Operations Regulation No. 84, referred to, was attached and is printed *infra*, pp. A–26 *et seq.*

York and when they arrived in the United Kingdom. And it would do so again on their return to New York if the representative of the War Shipping Administration in the United Kingdom who had charge of rerouting directed the vessels to return to New York. When the *Eks* operated on that route, A Company, as general agent, would therefore render berth agency services to it without special designation as berth agent. Now assume the B Steamship Company was designated as berth agent for a route from the Gulf of Mexico to the United Kingdom. When the *Eks* was assigned to make a voyage to the United Kingdom from a port in the Gulf of Mexico, the B Company, the regular berth agent for that route, and not the A Company, the ship's husband, would act as berth agent for the vessel both in the Gulf of Mexico and on its arrival in the United Kingdom. And this even though the A Company, the general agent for the *Eks,* was acting as berth agent for the same port in the United Kingdom for vessels on its New York-United Kingdom route. In other words, although a general agent is acting as berth agent in the United Kingdom for vessels from United States North Atlantic ports, it will not act as berth agent for vessels arriving from a United States Gulf port even though the vessels should be among those assigned to it as general agent. Conversely, the B Company, acting as berth agent for the Gulf of Mexico-United Kingdom route, and not the A Company, the general agent, would perform the duties of husbanding the *Eks* in the United Kingdom.

The powers of general agents and berth agents were alike restricted when vessels entered the immediate war zone areas. In those cases the Government performed all such services either by the military authorities or by the War Shipping Administration's own foreign service representatives. (Organized under War Shipping Administration Administrative Order 2, Supplement 4, September 26, 1942, and 4A (Revised), see also Administrative Order 52, December 3, 1943.) At the height of operations, War Shipping Administration maintained a staff of 675 employees located in almost every foreign port in the world in which its vessels were operating. Operating regions, headed by a Regional Director reporting directly to the War Shipping Administrator, were set up to cover all foreign areas.

Port Representatives, port engineers, and, in some cases, supplemental administrative and legal personnel were assigned at important ports in such areas to carry out the functions of the War Shipping Administration. Foreign service personnel was transferred from port to port as the war theatres changed and new fronts became active. Even at present, in Japan and Korea, no American steamship companies have been permitted to operate. The business of Government merchant vessels operating in those areas is still handled exclusively by the foreign service representatives of the Maritime Commission as successor to the War Shipping Administration, operating through the military authorities.

General agents were further restricted in the extent of their authority by the action of the Government in entering into master contracts for the procurement of various services and supplies required by general agents and berth agents for husbanding the vessels and affording them port services. Thus, master contracts for repairing, terminal operation, stevedoring, bunkering, and food stockpiling were entered into by the Government. (See pp. 408–583 of Document 4, Plaintiff's Exhibit 7.) All repairs to vessels under general agency agreements were performed under one of several types of repair contracts (pp. 408–496), which included both master contracts for principal repairs and special contract forms to be used by agents in contracting in the name of the United States for isolated repairs when repair contractors under master contracts were not available. Eventually, all oil bunkers and Diesel fuels supplied were delivered to the master of the vessel pursuant to orders placed by the general agent on his requisition under contracts designated Warshipfuel and Warshipdiesel (pp. 550–554). A contract designated Warshipfood (pp. 556–564) was also prepared and executed in various ports to assure adequate supplies of scarce foods for vessels. Similar arrangements were made in respect of towage services in various ports (Operations Regulation 27 and supplements).

Even in the absence of master contracts, the War Shipping Administration instructed agents in many respects as to the terms of the contracts they were authorized to make. In accordance with the agency agreements, the provisions of Legal

Bulletin No. 1 (September 22, 1942) and General Order No. 42 (9 Fed. Reg. 4110), such contracts for vessel supplies and services were required to be executed in the name of the United States and agents were referred to in that capacity only. It is believed attention should be drawn to the provisions of certain Operations Regulations and their supplements, particularly Nos. 27 (Towage Contracts), 84 (Duties of Berth Agents, General Agents, and Agents), 97 (Bunker Oil Contracts), 99 (Supplemental), and 2 (Pilferage). While some of these regulations were issued subsequent to the date of Caldarola's injury, the procedures codified therein had been established at an earlier date. The close character of the control exercised over general agents and berth agents is further indicated by the duties assigned to the various units of the War Shipping Administration Division of Operations, as indicated in Administrative Order No. 50, together with Supplements 1, 8, 13, and 17 thereto.

The most significant restriction on general agents is the lack of control over the masters and crews serving on vessels assigned to them which results from the requirement of Article 3A (d) that the master shall be the agent of the United States (not of the general agent), and in the exercise of his duties in the navigation and management, has exclusive control over the vessel and its crew. General agents are thus confined to procuring the crews and serving as the channel of command between the War Shipping Administration and the master. In 1942, at the commencement of War Shipping Administration operations, collective bargaining agreements between the maritime unions and the steamship companies were continued in force in accordance with the so-called Statements of Policy of May 4 and May 12, 1942, signed jointly by representatives of the Administration and the unions (see War Shipping Administration Operations Regulation No. 1). Subsequent changes in wages and working conditions were approved by the War Shipping Administration, and where required, by the War Labor Board, before being placed in effect by the Administration. Moreover, a Division of Maritime Labor Relations was created by Administrative Order 20 of June 10, 1942, for the purpose of

handling labor relations problems arising in the course of operations and insuring the continuance of proper labor relations.

The relationship between the seamen and the vessel is brought home to them in such a way that they can never have any reasonable doubt that they were serving on United States owned and operated vessels. The articles of employment signed by the seaman designate the United States as the owner of the vessel and the general agent as its agent. Thereafter he is directly supervised and controlled by the master throughout the entire course of the voyage. A certificate of ownership as well as copy of the articles is conspicuously posted on board and seamen are thus constantly aware that they are serving on a vessel owned and operated by the United States. Upon termination of the voyage wages are paid to members of the crew by the master in the presence of a Shipping Commissioner. Funds for the purpose are made available to the general agent by the Administration through deposit in the special joint bank accounts set up in the name of the agent "as general agent for the War Shipping Administration." These procedures inevitably brought home to the seaman his status was that of an employee of the United States.

It is believed that the above explanation of the roles of berth agents and master contracts and the status of masters and crews as employees of the United States shows that in their operations general agents clearly were not authorized to exercise the rights of an owner *pro hac vice* in manning, navigating, and managing the vessels assigned to them. For your further assistance there is submitted with this letter a collection of official documents referred to herein so far as they are not included in Document 4 (Plaintiff's Exhibit 7).

CONCLUSION

It is believed that the foregoing explanation conclusively establishes the purpose of the War Shipping Administration in undertaking direct operation of its vessels by masters and crews subject exclusively to its control. The purpose appears to have been threefold: First, to retain for government shipping the right to invoke sovereign immunity from foreign and local inspection, regulation, and taxation; Second, to obtain for gov-

ernment shipping the freedom from strikes or labor stoppages which results from preserving the status of all seamen on War Shipping Administration vessels as government employees; Third, to insure the preservation of indispensable wartime secrecy by confining all litigation which might in any way involve the navigation and physical management of government vessels to the admiralty courts where necessary security measures could be applied. It is believed that the explanation further shows beyond the possibility of doubt that operation under the general agency and berth agency agreements, as carried out by the regulations and master contracts of the War Shipping Administration, was direct government operation, differing in every essential respect from the peacetime contract operations involved in cases such as *Quinn* v. *Southgate-Nelson Co.* and *Brady* v. *Roosevelt S. S. Co.*

Respectfully.

(Sgd.) Wade H. Skinner,
General Counsel.

APPENDIX C

Operations Regulations No. 84. (Revised)

PERTAINING TO ALL VESSELS OWNED BY OR UNDER CHARTER TO THE WAR SHIPPING ADMINISTRATION

(Dry cargo and passenger vessels)

Subject: *Definition of duties of berth agents, general agents, and agents*

Operations Regulation No. 84, dated December 29, 1943, and Supplement No. 1 thereto, dated March 22, 1944, are consolidated and amended to read:

General Order No. 21, Supplement No. 4, prescribes a revised form of service agreement for Berth Agents, which requires the Berth Agent to account directly to the Administration, instead of to the Agent or General Agent with respect to accounts that have not been rendered to the Agent or General Agent, prior to January 1, 1944. Otherwise, the outstanding regulations defining the duties of the Berth Sub-Agents, Agents and General Agents will govern with respect to services rendered, prior to January 1, 1944. Effective January 1, 1944, the duties of the Berth Agent and the Agent or General Agent will be as follows:

(1) Unless otherwise directed by the Administration, the Berth Agent shall in all cases, for the account of the Administration:

(a) Book the cargo and expedite its delivery alongside ship. Issue or cause to be issued to shippers customary freight contracts, and bills of lading in the form prescribed by the Administration, and prepare manifests and other cargo documents. Where appropriate, book passengers and issue or cause to be issued to passengers customary passenger tickets in the form prescribed by the Administration. Handle mails;

(b) Collect all moneys due the United States under the Berth Agency Service Agreement and deposit, remit, or disburse the same in accordance with such regulations as the Administration may prescribe from time to time, and account to the Administration for all moneys collected or disbursed by it or its Agents;

(c) While the vessel is under assignment to the Berth Agent, appoint subagents at foreign and intermediate ports of call for the receipt or delivery of cargo or for orders, and, subject to the provisions of paragraphs (2), (3), and (4) hereof, appoint subagents at domestic ports;

(d) While under his assignment arrange entrance and clearance of vessel at all foreign ports, except as provided in paragraph 6 (a), including entrance at the first port of loading and clearance from the last port of discharge.

(e) Pay agency fees, port charges, and cargo expenses in foreign and domestic ports, including fees and expenses incurred pursuant to paragraph (6) where the Berth Agent has been appointed to act in such matters as the agent of the General Agent or owner, pursuant to paragraph (6) (b);

(f) Adjust and settle cargo claims in accordance with the provisions of Wartime Insurance Instructions No. 1, as amended.

(g) Make all necessary arrangements for the transit of canals, except the Panama Canal as provided for in paragraph (5) (b).

(h) The Berth Agent shall notify the Agent or General Agent in advance of any requirements peculiar to the trade which relate to the duties of the Agent or General Agent such as arrangements for dunnage, slings, fresh water, draft, etc., affecting the projected voyage in the service of the Berth Agent.

(2) Where the Agent or General Agent does not provide its own facilities in the United States port of loading or discharge, and when not otherwise directed or approved by the

Administration, the Berth Agent shall for the account of the Administration:

(a) Receive and deliver the cargo, passengers, and mail; provide and pay for stevedoring and other cargo-handling expenses, port charges, wharfage and dockage, pilotage, commissions, and consular charges (except those pertaining to the master, officers, and crew) and all other expenses in connection with the handling of the cargo, passengers, and mail.

(3) Where the Agent or General Agent provides its own facilities in the United States port of loading or discharging, and when not otherwise directed by the District Director in charge of the port where the services are performed, the Agent or General Agent shall for account of the War Shipping Administration perform the duties provided in paragraph (2) of this regulation, but the Berth Agent shall have the right to employ a Head Receiving or Delivery Clerk to supervise the operation of receiving and delivering cargo.

(4) Where the Agent or General Agent and the Berth Agent both provide their own facilities in the United States port of loading or discharge, the duties provided in paragraph (2) of this regulation shall be performed for the account of the War Shipping Administration as directed by the District Director in charge of the port where the services are performed.

(5) Except as otherwise directed by the Administration, the Agent or General Agent for account of the War Shipping Administration shall, in all cases:

(a) Order and pay for fuel, after consultation with the Berth Agent, and follow such instructions with regard thereto as shall be issued by the Administration from time to time ;

(b) Make all necessary arrangements for transit of the Panama Canal.

(6) Except as otherwise directed by the Administration, the owner or General Agent shall in all cases:

(a) Appoint subagents to handle the vessels' business, such as repairs, restowage of cargo, matters involv-

ing General Average, etc., and where the ship calls for orders between berth agency assignments.

(b) The War Shipping Administration requests that as far as practicable all General Agents use the subagents of the Berth Agents at foreign ports for the handling of the vessels' business, in addition to the cargo activities performed by such subagents for the Berth Agent. It is also deemed desirable that the same procedure be followed with respect to time-chartered vessels and it is requested that Time Charter Agents ask the owners of all vessels time chartered to the Administration to use the subagents of the Berth Agents at foreign ports in similar instances and to authorize the latter to reimburse the subagent for expenses properly incurred for the owner's account.

(c) In every case where, in accordance with paragraph (a) hereof, the foreign subagent of a Berth Agent is used, the Berth Agent hereby is authorized to reimburse the foreign subagent out of War Shipping Administration funds for any husbanding expenses incurred for such vessel which are for account of the War Shipping Administration and when so authorized by the owner in the instance of a time-chartered vessel, for account of such owner. The Berth Agent shall submit to the General Agent or to the owner of the time-chartered vessel, as the case may be, the invoices and other documents covering all such husbanding expenses and shall collect from them the amounts of such expenses. In the event the General Agent, or, in the instance of a time-chartered vessel, the owner has reason to question or disapprove the payment of any particular item, same shall be referred by them to the Berth Agent for adjustment with the subagent. This provision is stipulated because of the General Agent's and owner's over-all responsibility for the husbanding of the vessel, although it is the purpose of this regulation to permit the Berth Agent promptly to reimburse foreign subagents for services rendered.

(7) The Berth Agent shall promptly notify the Agent or General Agent of all known deviations or intended deviations under the terms of the bill of lading or affreightment contract. It shall be the responsibility of the Agent to immediately transmit such notification to the owner of a vessel under time charter. Upon receipt of such information the General Agent or owner shall promptly notify the P. & I. Underwriters pursuant to policy requirements. Such exchanges or notifications shall be made pursuant to applicable provisions of War Shipping Administration security orders and regulations.

(8) All Agents, General Agents, and owners shall attend to matters in connection with Marine casualties and resulting claims in accordance with appropriate instructions issued by the Director, Division of Wartime Insurance.

(Sgd.) G. H. Helmbold,

G. H. Helmbold,

Assistant Deputy Administrator for Ship Operations.

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